Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

NANCY G. PERÉ, individually and on behalf of her minor children, Matthew Reed Peré and Marci Danielle Peré,

Petitioner,

versus

NUOVO PIGNONE S.p.A,

Respondent.

On Petition For Writ Of Certiorari To Review Decision Of The Fifth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. TIERING: Whether Nuovo Pignone was ever a sovereign agency or instrumentality of the Government of Italy when it exercised business, not government functions, and was not created directly by the sovereign but was only a creature of a creature of the state. (SPLIT IN CIRCUITS – Rule 10(a).)

2. TIMING: Whether an entity that is privatized before commencement of the lawsuit may be considered a "foreign sovereign" under the FSIA. (SPLIT IN CIRCUITS – Rule 10(a).)

3. COMMERCIAL ACTIVITY: Whether a defendant engaged in purely commercial activities, including substantial commercial activity in the United States and purchase of a turbine starter engine manufactured in the United States, then installing it aboard a platform constructed at a shipyard in Bayou Black, Louisiana, and shipped off the coast of Africa for installation there, where it was operated by a U.S. oil company, and later redesigned, repaired and maintained under contracts with U.S. service companies, can be said to have engaged in an activity which has no "nexus", "material connection", or "direct effect" in the United States. (SPLIT IN CIRCUITS – Rule 10(a).)

4. WAIVER: Whether Nuovo Pignone's repeated agreements to arbitrate contract disputes in foreign forums and to be bound by the laws of other states including Texas and Louisiana, constitute "waiver" of its right to claim sovereign immunity. (SPLIT IN CIRCUITS – Rule 10(a).)

LIST OF ALL PARTIES

Nancy G. Peré Matthew Reed Peré and Marci Danielle Peré	Plaintiffs/ Petitioners
Tuthill Corporation and Coppus Engineering	Defendants in Principal Action Aligned with Plaintiffs on writ application
Nuovo Pignone, S.p.A.	Defendant/ Respondent
General Electric Company	Defendants in Principal Action
Cabinda Gulf Oil Company Division of the Chevron Company	Defendants in Principal Action

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CITATIONS AND SUMMARIES OF DECISIONS BY LOWER COURTS

(1) ***Decision by the Trial Judge***: (Unreported – See Appendix B)

Judge Doherty of the Western District of Louisiana, Lafayette-Opelousas Division, denied Nuovo Pignone's exception to jurisdiction.

(a) ***Tiering***: Judge Doherty recognized the split in the circuits on the question of whether a twice-removed foreign government agency has the right to claim sovereign immunity. The judge refused to follow the Ninth Circuit decision in *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995). She chose to follow decisions in the Fifth and Seventh Circuits. See, *In Re: Aircrash Disaster Near Roselawn, Indiana on October 31, 1994*, 96 F.3d 932 (7th Cir. 1996); *Delgado v. Shell Oil Company*, 890 F.Supp 1315 (S.D. Tex. 1995); *Talbot v. Agsaipem A. G.*, 835 F.Supp 352 (S.D. Tex. 1993). She nevertheless commented that the *Gates* analysis was "strong and persuasive".

(b) ***Timing***: Again the judge recognized the split in the circuits on the question of whether sovereign status was to be determined on the date of the accident or the date of the filing of the lawsuit. The court chose to follow *Straub v. A. P. Green, Inc.*, 38 F.3d 448 (9th Cir. 1994), rather than *General Electric Capital Corp. v. Grossman*, 991 F.2d 1376 (8th Cir. 1993) and *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445 (6th Cir. 1988).

(c) ***Commercial Activity***: the court found that the commercial activity exception applied and that Nuovo Pignone was subject to the jurisdiction of the court.

(2) ***Decision by the Fifth Circuit*** **(Peré v. Nuovo Pignone, Inc.,** 150 F.3d 477 (5th Cir. 1998) – Appendix A)

The Fifth Circuit reversed the trial court and has dismissed plaintiff's claim against Nuovo Pignone for lack of jurisdiction under the FSIA.

On the question of "timing" the court recognized the split in the circuits and chose to follow *Grossman* rather than *Straub* – as had the trial judge.

The court looked at the "commercial activities" exception and applied the Fifth Circuit's standard in *Stena Rederi A.B. v. Comision de Contratos,* 923 F.2d 380 (5th Cir. 1991), holding that the Perés had failed to meet the weighty "material connection" requirement of *Stena.*

STATEMENT OF JURISDICTION

This litigation involves application of the Foreign Sovereign Immunities Act, 28 USC § 1602 et seq. – the United States courts have federal question jurisdiction.

The United States Supreme Court has jurisdiction to review the judgment of the Fifth Circuit Court of Appeals rendered September 21, 1998, by issuance of a writ of certiorari under 28 USC § 1254(1).

This writ application demonstrates that there are SPLITS IN THE CIRCUITS on four issues which are important to reaching a decision on the question of FSIA jurisdiction. Therefore, the Court has jurisdiction to issue a writ of certiorari under its Rule 10(a) because "a United States court of appeals has entered a decision in conflict

with the decision of another United States court of appeals on the same important matter".

STATUTES INVOLVED

(See Appendix G.)

STATEMENT OF THE CASE

Marcus Daniel Peré was employed by Chevron Oil Company in March of 1979. In 1993 he was working aboard a production platform off the coast of Cabinda, Angola, West Africa. On October 16, 1993, while in the course and scope of his employment, Marcus Peré was killed by the explosion of a turbine engine, which he and a fellow employee were attempting to repair.

The turbine engine was owned by Nuovo Pignone, Inc. and was part of the platform equipment which Chevron Oil Company operated. It had been manufactured and purchased in the United States, then was sent to Italy for inclusion into a larger compressor system which was shipped back to Bayou Black, Louisiana for further assembly and installation aboard a platform, under Nuovo Pignone's supervision there (Appendix F, 18-22). The assembled platform was then towed to Cabinda Gulf, offshore Angola, West Africa. While on the platform, the turbine was "reconfigured", repaired, maintained and serviced by U.S. service companies, under contracts with Nuovo Pignone. Chevron operated the platform upon which the turbine was installed, and Mr. Peré worked for

Chevron. The reconfigured turbine compressor exploded, killing Mr. Peré; no study had been made to determine whether the reconfiguration modifications were safe for the compressor accessories – like the starter. (Appendix F, 11, 14-16.)

Mr. Peré is survived by his widow, Nancy Peré, and their two minor children, Matthew Reed Peré and Marci Danielle Peré. The Plaintiffs have brought suit against Nuovo Pignone and its affiliate companies, as owners, designers and manufacturers of the defective turbine system, and against Coppus Engineering and Tuthill Corporation, as manufacturers of the defective turbine starter, and against Agip Petroleum Company, as an owner-operator of the offshore platform; Defendants' insurers are also named as defendants.

Plaintiffs have stated a cause of action in negligence for the faulty design, manufacture, modification and marketing of the turbine system, alleging the defective system had a propensity to explode and was dangerous, and that Defendants failed to warn Plaintiff of these dangers; and further that Defendants assembled, "customized" and modified the system, improperly combining it with a natural gas turbine system, causing it to explode and kill Mr. Peré. Plaintiffs also allege that the Defendants acted with wanton and gross negligence and intentional indifference to the safety and welfare of persons who would be operating the turbine system. Plaintiffs have sued under Texas and Louisiana state tort laws, as well as under contract warranty and relevant federal maritime laws.

Nuovo Pignone, as owner of the defective and dangerous turbine system, filed an exception to federal jurisdiction, alleging its sovereign immunity from suit under the Foreign Sovereign Immunities Act, 28 USC § 1602 et seq.

Plaintiffs argued before the district court and the court of appeals that Nuovo Pignone should not be allowed to assert sovereign immunity, because it is not in any sense a "sovereign" (QUESTION NO. 1). At the time of the accident Nuovo Pignone was majority owned by a commercial joint stock company which reported to the Italian Ministry of Treasury. That entity, Ente Nazionale Idrocabun (ENI), owned the majority of stock in Nuovo Pignone; private entities owned the balance of the stock. No evidence was introduced to show that Nuovo Pignone was in any way especially controlled by the state or engaged in any governmental or political functions. Nuovo Pignone's activities were purely of a private, commercial nature. There is a split in the circuits, but Plaintiffs believe the best interpretation of the FSIA, as recognized by commentators and by some of the circuits, is that an entity which is twice-removed from the government of Italy, as Nuovo Pignone is, should not be entitled to claim sovereign immunity – this is referred to as the *"tiering"* issue.

A second issue has to do with *"timing"*: whether Nuovo Pignone can claim sovereign immunity though the government of Italy, through ENI, did not have a majority ownership in Nuovo Pignone at the time the lawsuit was filed (QUESTION NO. 2). There is a split in the circuits on this issue as well: Some circuits look at the ownership of the defendant entity as of the date of the accident, other

circuits look at ownership as of the date of the filing of the lawsuit.

A third legal issue over which the circuits are split has to do with how courts weigh the "connection" between a cause of action and the defendant's contacts or activities here in the United States (QUESTION NO. 3). One commentator points out that there are "numerous variations" in how the courts approach this question. The Fifth Circuit has been requiring plaintiffs to show "substantial" and "material" connection between the particular event giving rise to the lawsuit and the defendant's commercial activity in the United States. Other circuits require less connection. The Fifth Circuit's standard seems more onerous and burdensome than need be, resulting in an extension of sovereign immunity into areas where that grant is no longer appropriate.

We are also confronted with the issue of *"waiver"*: Whether Nuovo Pignone's contractual consent to have disputes between it and its business partners decided in the forums of other states, or by arbitration, in accordance with substantive laws of other states (including Texas), constitute a waiver of its right to claim sovereign immunity (QUESTION NO. 4).

FSIA jurisprudence is in disarray. Some commentators are referring to the present situation as intolerable and disastrous. This lawsuit raises important issues spanning the spectrum of FSIA litigation. Plaintiffs believe there are compelling reasons for the Court to grant writs.

ARGUMENT

(1) TIERING: Whether Nuovo Pignone was ever a sovereign agency or instrumentality of the Government of Italy when it exercised business, not government functions, and was not created directly by the sovereign but was only a creature of a creature of the state. (SPLIT IN CIRCUITS – Rule 10(a).)

The trial judge has referred to this as a "difficult issue", and recognized a SPLIT IN THE CIRCUITS, citing (a) *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995), and contrasting that decision to (b) *In Re Aircrash Disaster near Roselawn, Indiana on October 31, 1994*, 96 F.3d (7th Cir. 1996).

The split in the circuits on this issue is being lamented by the legal community:

> Courts principally disagree as to whether to allow "tiering" – classifying an entity as an agency or instrumentality of a foreign state when the state does not own a direct interest in the entity. This particular split is solidifying as these cases appear more frequently. In fact, since September, 1996 the Ninth Circuit has reaffirmed its position that tiering should not be allowed, while the Seventh Circuit has directed that tiering is permissible, specifically disagreeing with the Ninth Circuit view. Joseph Hardy, Jr., *"Wipe Away the Tears: Determining Agency or Instrumentality Status under the Foreign Sovereign Immunities Act"*, 31 Georgia Law Review 1121 (1997). *Citing, Corporacion Mexicana de Servicios Maritimos v. M/T Respect*, 89 F.3d 650, 654-655 (9th Cir. 1996); *In Re Air Crash Disaster Near*

Roselawn, Indiana, 96 F.3d 932 (939-941) (7th Cir. 1996).

Mr. Hardy's article finds the split troubling, and points out that "tiering" is contrary to the policy and language of the FSIA:

> Both the language of the FSIA and its legislative history indicate that tiered entities do not qualify as "agencies or instrumentalities of a foreign state" based solely upon their ownership by an entity which is itself majority-owned by a foreign state
>
> * * *
>
> The statutory language of the FSIA suggests that agencies or instrumentalities are included in the immunities and federal jurisdiction of the FSIA, but do not themselves become statutorily defined foreign states able to grant instrumentality status to entities below them. *"Wipe Away the Tears . . . ", supra*, p. 1129.

The author cites *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995), and believes that decision (disallowing tiering) should be favored over rules developed in other circuits.

There are compelling reasons for the Supreme Court to take up this matter and to lay down a uniform standard. The rule in some circuits, and in the decision of the lower courts in this case, allowing "tiering" is contrary to the intent of Congress in enacting the FSIA and expands the doctrine of sovereign immunity, which Congress meant generally to restrict to the *political* activities of foreign states. "Tiering" has the effect, not of restricting sovereign immunity to state government activities, but of

expanding the state's sovereign immunity and extending it to business entities created by state agencies for the purpose of competing in international commerce. Abandonment of the "King can do no wrong" doctrine and adoption of a "restrictive" immunity was meant to level the playing field in international business competition. Besides, application of the tiering principle penalizes the Peré family; this Court should be solicitous to assure the family is fairly and justly compensated for the death of its husband-father.

The vast increase in international business activity by state sponsored agencies of the emerging nations, as well as by those of the long prosperous western nations, has greatly increased recourse to the doctrine of sovereign immunity in litigations in the United States:

> As of 1986, state-owned trading enterprises accounted for over 15% of international trade. Thus . . . the FSIA is taking on increasing importance in the resolution of disputes arising out of international trade. Nicholas Evanoff, *"Direct Effect Jurisdiction Under the Foreign Sovereign Immunities Act of 1976: Ending the Chaos in the Circuit Courts,"* 22 Houston Law Review 629, 630-631 (May 1991).

(2) TIMING: Whether an entity that is privatized before commencement of the lawsuit may be considered a "foreign sovereign" under the FSIA. (SPLIT IN CIRCUITS – Rule 10(a).)

> . . . [C]ases have arisen in which a defendant corporation has been nationalized or denationalized after performing the act on which a

> plaintiff's complaint is based. Because the terms of the FSIA do not recognize the possibility of a change in status, courts in these cases have found it difficult to determine whether these "changed-status" defendants are "sovereigns" under the FSIA. Simmons, *"Nationalized and Denationalized Commercial Enterprises Under the Foreign Sovereign Immunities Act,"* 90 Columbia Law Rev. 2278, 2279 (Dec. 1990).

We are dealing here with the question of whether a court should look to the alleged sovereign status of Nuovo Pignone at the time of the accident, or at the time of filing the lawsuit. Plaintiffs urge the Court to look at Defendant's status at the time the suit was filed, as was done in *Straub v. A.P. Green, Inc.*, 38 F.3d 448 (9th Cir. 1994).[1]

But the lower courts in the case at bar, recognizing the split in circuits, have chosen to follow the rule announced by the Eighth Circuit in *General Electric Corp. v. Grossman*, 991 F.2d 1376 (8th Cir. 1993).[2]

Because there is a SPLIT IN THE CIRCUITS, there are compelling reasons for this Court to take up this case, to clarify and resolve the conflicting jurisprudence, and to lay down a uniform standard.

Remember, the FSIA was enacted to *restrict* a commercial defendant's right to claim sovereign immunity. Where we are dealing with causes of action which arise *outside* the boundaries of a nation-state, causes of action

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[1] See also, *Rutkowski v. Occidental Chemical Corporation*, 1988 U.S. Dist. LEXIS 11414 (N.D. Ill. 1988); *Ocasek v. Flintkote Co.*, 796 F.Supp. 362 (N.D. Ill. 1992).

[2] For a lengthy review of the "split", see 120 ALR Fed. 542.

arising from business enterprise and competition in international commerce, the United States has no interest in enlarging immunity for twice-removed agencies engaged in such activities. The American understanding of justice, and indeed the understanding of most nations in the world today, does not expect that our courts protect foreign governments from liability incurred in the conduct of commercial activities.

Nuovo Pignone is no longer the instrumentality of a foreign sovereign. It is a large business enterprise capable of shouldering responsibility for its past actions and negligence. A judgment against Nuovo Pignone today will not offend Italian sovereignty in the least.

(3) COMMERCIAL ACTIVITY: **Whether a defendant engaged in purely commercial activities, including substantial commercial activity in the United States and purchase of a turbine starter engine manufactured in the United States, then installing it aboard a platform constructed at a shipyard in Bayou Black, Louisiana, and shipped off the coast of Africa for installation there, where it was operated by a U.S. oil company, and later redesigned, repaired and maintained under contracts with U.S. service companies, can be said to have engaged in an activity which has no "nexus", "material connection", or "direct effect" in the United States. (SPLIT IN CIRCUITS – Rule 10(a).)**

Men of good will today do not believe the king can do no wrong. Men of good will today believe that a

person, whoever he is, must be held accountable for the consequences of his conduct. The United States and the individual states of our country are subject to being sued where they have acted wrongly, and must repair damages which they cause to individuals, whether the individuals be United States citizens or foreigners.

It is one thing to grant a foreign nation immunity from suits in our courts where the cause of action arises within the confines of that nation-state. It is quite another thing to grant immunity for negligent acts committed far beyond its borders, while it engaged in lucrative commercial activities, after entering into contracts and working agreements with various business enterprises of the United States and other nations or with private multinational corporations.

Nuovo Pignone is engaged in oil and gas production around the world. Like its private competitors, it purchases equipment and invests capital in profitable ventures wherever it chooses. Nuovo Pignone realizes about $100 million in annual sales in North America; it has offices in New York, Houston and Los Angeles, and advertises in trade journals distributed in this country. (Appendix F, 1-5, 22, 24-25.)

Nuovo Pignone is acting as a commercial business corporation, not as an arm of the state of Italy. No one is claiming that "King Italy" is invading their territorial space or plundering their oil reserves by doing business. Italy is not acting as a government for political ends, and must be accountable for its conduct in foreign lands. Having married itself to private business corporations in a headlong rush for profits, is it fair and just for Nuovo

Pignone to claim a "sovereign" status to shield itself from ordinary accountability?

Whose interest should our courts be trying to protect? What policy considerations are paramount?

All over the world today, American workers are being employed in the specialized work of exploring for, developing and producing oil and gas resources. These workers commute back and forth from the United States. The U.S. Gulf Coast provides most of these workers, and their participation is important to the economic future of developing nations and to the balanced development of the world's supply of hydrocarbons.

Mr. Peré was not working for the state of Italy. He was not aware of any "sovereign presence" on the platform. He saw no royal seal stamped on the turbine engines. He was working in a venture for profit. His coworkers were not state officials and they brandished no "diplomatic immunity". They were employed by a number of different business entities, and were all ordinary people like himself. The equipment he worked with was like the equipment owned by private enterprises all over the world.

The turbine engine exploded because it was poorly manufactured, designed, assembled and maintained, and because it was being used improperly and in a dangerous manner, without warning. Nuovo Pignone is responsible for its defective equipment and its negligence in maintaining and using that equipment.

Surely, our courts have more interest in recognizing the rights of Mr. Peré and his family – who are U.S.

citizens, employed by a U.S. corporation – than in stretching the limits of the doctrine of sovereign immunity to shield Nuovo Pignone. If there are conflicts in the circuits, if there are different positions being taken by the courts, if the FSIA does not clearly exempt Nuovo Pignone from lawsuit, then all of these uncertainties and variables should be interpreted and applied to protect the Peré family, not to extend the archaic notion that "the King can do no wrong". Defendants claiming sovereign immunity bear the burden of persuasion.

It hardly needs to be stated that summary judgment is only appropriate where the law is clear and there are no disputes on material facts. How can we pretend that standard was reached in the case at bar? The law is not clear; there are splits in the circuits on several of the crucial legal standards this Court must apply. There are serious disputes on almost every factual front. The Fifth Circuit clearly erred in reversing the trial court and extending sovereign immunity to Nuovo Pignone.

The doctrine of sovereign immunity continues to be only "a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution". *"Comment: Retroactivity, Implied Waiver, and the FSIA: Is it Time to Reform the Law of Sovereign Immunity?,"* 24 Hofstra Law Review 515, 519 (Winter '95). See also, *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983).

It is said that "the urge to grant sovereign immunity has . . . lost much of its force". Cordozo, *International Law in the New York Courts – 1953*, 40 Cornell LQ 97, 109 (1955).

> It is . . . a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. *Opinion by Chief Justice Marshall, United States v. Planters' Bank of Georgia*, 22 U.S. (9 Wheat.) 904, 907 (1824).

With regard to the background and policies underlying enactment of the Foreign Sovereign Immunities Act:

> Until the mid-twentieth century the United States followed the absolute theory of sovereign immunity, under which all foreign states enjoyed complete immunity from U.S. courts. With the rise of international commerce and the resulting increase in domestic claims against foreign states for their commercial activities, the United States in 1952 adopted the restrictive theory of sovereign immunity – granting immunity to foreign states and their instrumentalities only for public, non-commercial activities. This change in policy was affected by a statement of intention expressed by the then U.S. Secretary of State, Mr. Tate – viz., "Tate Letter". *"Wipe Away the Tears . . . ", supra*, p. 1125.

Before the FSIA's passage, there was a swing away from the deference to sovereign immunity in situations where a foreign entity was not acting for government or political purposes but was engaged in commercial enterprise: "these enterprises were treated as private entities and denied the privileges of sovereignty, including sovereign immunity, unless they could show that their activities were of a strictly public nature." Simmons, *"Nationalized and Denationalized Commercial Enterprises*

Under the Foreign Sovereign Immunities Act," 90 Columbia Law Review 2278 (December 1990).[3]

> The present application of the Doctrine of Foreign Sovereign Immunity was significantly influenced by the shift or change in United States policy announced in the May, 1952 letter from the Acting Legal Advisor of the Department of State to the Acting Attorney General. After referring to the classical or "absolute" theory of sovereign immunity, the letter stated that "it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity." 26 Dep't St. Bull. 984, 985 (1952) (Quoting Letter from Jack B. Tate, Acting Legal Advisor, Department of State to Acting Attorney General Phillip B. Perlman (May, 1952)).
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> In the Restatement, it is stated that under the act of state doctrine the courts of the United States "will generally refrain from . . . sitting in

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[3] See also, *Oliver American Trading Company v. United States of Mexico*, 5 F.2d 659 (2nd Cir. 1924); *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199 (S.D. N.Y. 1929). In the report of the House Judiciary Committee hearings prior to enactment of the FSIA, it was stated that a defense of sovereign immunity is appropriate only where a defendant can show it is a foreign state and "that the Plaintiff's claim relates to a public act of the foreign state – that is, an act within the exceptions in sections 1605-1607." H.R. Rep. No. 1489, 94th Cong. 2d Sess. 1, 12 (1976).

judgment on other acts of a governmental character done by a foreign state within its own territory and applicable there." Restatement (Third) of Foreign Relations § 443(1) (1987).

* * *

The House Report . . . notes that the FSIA was intended to codify the principle of international law that a sovereign state is entitled to immunity only for *jure imperii*, its public acts, but not for *jure gestionis*, its commercial or private acts." *Nelson v. Saudi Arabia*, 923 F.2d 1528, 1531-1532 (11th Cir. 1991). See also, Teitz, *Transnational Litigation* (1996) p. 73.

The drafters of the Act saw it as a response to the need for legislation to deal with the increasing contact of American citizens with foreign states and entities, which contact called into question whether American citizens would have access to the courts in order to resolve ordinary legal disputes. Among the major objectives of the Act was the codification of the so-called "restrictive" principle of sovereign immunity under which the immunity of a foreign sovereign was "restricted" to suits involving a foreign state's public acts and did not extend to suits based on its commercial or private acts, the Act being intended to ensure that the restrictive principle of immunity consistently was applied in litigation before United States courts, thus transferring the determination of sovereign immunity from the Executive Branch to the Judicial Branch. *"Exceptions to Jurisdictional Immunity of Foreign Sovereigns and Their Property Under the*

Foreign Sovereigns Immunity Act of 1976 (28 USC §§ 1602 *et seq.*)", 59 ALR Fed. 99, 103-104.

The FSIA, 28 USC § 1605(a)(2) simply provides that our courts have jurisdiction where the cause of action involves "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere". There is no "material connection" standard laid down.

Certainly, it is proper to require that there be some connection between a cause of action brought in our courts and the interests of people in the United States. But this Court long ago threw aside stultifying protectionist doctrines and attitudes sanctioning "forum disinterest" ("passing the buck"). In *International Shoe Company v. Washington*, 326 U.S. 310, 66 S.Ct. 154 (1945) this Court considered the requirements for accepting judicial competence and jurisdiction over foreign corporations doing business in a state:

> Due process requires only that . . . a defendant . . . have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice". *Id.*, U.S. p. 316, S.Ct. p. 158.
>
> . . . . [T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as these obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances

> hardly be said to be undue. . . . *Id.*, U.S. p. 319, S.Ct. p. 160.

International Shoe has made justice possible in situations where technicality and protectionism had shielded foreigners (out-of-staters) before. We may ask whether the FSIA is being drafted into a revived protectionism.

There is no need to require an injured party to bear a heavy burden in establishing a foreign corporation's commercial activity with the forum state. Foreign corporations are considered subject to the jurisdiction of our federal courts whenever the corporation's "aggregated contacts with the United States as a whole are sufficient, even though the contacts within the state in which the federal court is sitting would not be sufficient if considered alone". Scoles and Hay, *Conflict of Laws* (West 1982), p. 333.

The Fifth Circuit is requiring a heavy burden for proving sufficient commercial activity and connection between the cause of action and the United States or forum state. The Fifth Circuit is asking for "substantial" and "material" connection (*Stena Rederi, supra*). This is bad policy, contrary to the spirit of the time and to the policies underlying the FSIA. The whole purpose of the FSIA was to extend the jurisdiction of our courts over the commercial activities of foreign states and their agencies and instrumentalities, where the interests of our people were involved and judicial remedies were required.

Compare the Fifth Circuit's "material connections" standard with the Ninth Circuit's decision in *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), where the court held that slight, irregular contacts

(nexus) between a foreign state's commercial activity in the United States and the plaintiff's grievance was sufficient to give jurisdiction under the FSIA. In *United World Trade v. Mangyshlakneft*, 821 F.Supp. 1405 (D.C. Colo. 1993), personal jurisdiction was determined under a "minimum contacts" test.[4]

Some courts are applying the "based upon" standard by considering whether the foreign corporation is "doing business" in the United States. This "doing business" test "focuses on the connections between the defendant and the United States; by definition it requires no specific connection between the lawsuit and the United States." Newman and Zaslowsky, *Litigating International Commercial Disputes* (West 1996), p. 114. The Fifth Circuit has rejected the "doing business" test, and requires plaintiffs to prove a more intense involvement between the activity out of which the cause of action arises and the forum state. See, *Vencedora Oceania Navigacion v. Compagnie*

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[4] *In Re Rio Grande Transport, Inc.*, 516 F.Supp. 1155 (S.D. M.Y. 1981), the federal court entertained an action brought by an American corporation against a foreign shipping company where the action arose out of a collision between the Plaintiff's vessel and a vessel operated by the defendant on the high seas. To establish jurisdiction over the foreign entity, the federal court found the foreign shipping company had sufficient contact with the United States, in that its vessels regularly call at United States ports for loading and discharging of commercial cargoes, that the shipping company earned substantial income from those activities, and spent substantial monies in the United States in connection with its shipping activities. The court looked not only at the particular vessel and the particular accident in question but at the foreign shipping company's worldwide operation of more than seventy vessels and their connections with the United States.

Nationale Algerienne de Navigation, 730 F.2d 195, 202 (5th Cir. 1984).

In applying the "direct effect" standard for establishing a FSIA "commercial activity" exception, some circuits say the "direct effect" in the United States need not be "substantial" or "foreseeable" (*Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2nd Cir. 1981)); while other circuits (including the Fifth Circuit) insist it *must be* "substantial" and "foreseeable" (*Zernicek v. Brown & Root, Inc.* 826 F.2d 415 (5 Cir. 1987)).

The commentators recognize there is a problem here; there are a multiplicity of standards in use among different courts:

> The lawsuit against the foreign state must also be "based upon" that commercial activity [28 USC 1605 (a)(2)(1988)]. Congress found an act to be based upon a commercial activity if the foreign state's acts had substantial contact with the United States. The Supreme Court has not addressed what constitutes substantial contact under the statute, allowing lower courts to create numerous variations. Amelia McCarthy, *"The Commerical Activity Exception – Justice Demands Congress Define a Line in the Shifting Sands of Sovereign Immunity,"* 77 Marquette Law Review 893, 903 (Summer '94).

(4) Waiver: Whether Nuovo Pignone's repeated agreements to arbitrate contract disputes in foreign forums and to be bound by the laws of other states including Texas and Louisiana, constitute "waiver" of its right to claim sovereign immunity. (SPLIT IN CIRCUITS)

Nuovo Pignone has entered into a number of contracts in which it agrees to arbitration of disputes in foreign forums and the application of non-Italian laws in the interpretation of contracts and resolution of disputes.

Plaintiffs have especially drawn attention to the Reconfiguration Agreement entered into by Nuovo Pignone, effective June 10, 1985, under which the turbine engine and associated compressor equipment were "reconfigured" to increase horsepower and the flow of gases through the compressor. (Faulty "reconfiguration" may have caused the explosion.) Under several provisions of that agreement, Nuovo Pignone agreed the law of the State of Texas would apply in dispute resolution. (See, Reconfiguration Agreement, Appendix E.)

Some courts have rejected "constricted views" which limit a foreign sovereign's "waivers". *Maritime International Nominees Establishment v. Republic of Guinea*, 505 F.Supp. 141 (D.C. 1981).

In *Ohntrup v. Firearms Center, Inc.*, 516 F.Supp. 1281 (E.D. Pa. 1981), the court acknowledged it would be reasonable to conclude that an agreement with a foreign country to arbitrate disputes in, or be governed by the laws of, the United States would constitute an implicit waiver by that foreign country of its sovereign immunity

in the courts of the United States. But Fifth Circuit courts are applying a more rigorous standard. *Castro v. Saudi Arabia*, 510 F.Supp. 309 (W.D. Tex. 1980). Again we see differences of interpretation and application of FSIA standards in the circuits.[5]

> Under a literal reading of Section 165 (a)(1), any 'waiver' by a foreign sovereign would establish both subject-matter and personal jurisdiction in U.S. courts. Newman and Zaslowsky, *Litigating International Commercial Disputes*, (West 1996), p. 120.

CONCLUSION

It has been said that Congress' enactment of the FSIA "did little more than produce a statutory skeleton from which the federal judiciary has been left to create, through a case-by-case decisional process, a fully developed body of sovereign immunity law". *Gibbons v. Udaras na Gaeltrachta*, 549 F.Supp. 1094, 1106 (S.D. N.Y. 1982).

There have been twenty years of jurisprudential creativity, and a number of often conflicting standards have been fashioned:

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[5] Some courts have followed the Judiciary Committee's suggestion that a choice-of-law selection of the law of another state constitutes an immunity waiver. *Joseph v. Office of the Consulate General of Nigeria*, 830 F.2d 1018, 1022 (9th Cir. 1987); *Marlowe v. Argentine Naval Comm'n*, 604 F.Supp. 703 (D.C. 1985). Other courts reject that approach. *Verlinden B.V. v. Central Bank of Nigeria*, 488 F.Supp. 1284, 1301-1302 (S.D. N.Y. 1980).

> . . . [T]he courts have been unable to agree as to the meaning of the jurisdictional criteria. The resulting ambiguity has been criticized as threatening the important policy of uniformity that underlies the FSIA. Newman and Zaslowsky, *Litigating International Commercial Disputes*, (West 1996), p. 114. See also, J. Dellapenna, *Suing Foreign Governments and Their Corporations* (1988), pp. 157-160.

The judicial application of the FSIA is in disarray. The Supreme Court must do some housekeeping. There are compelling reasons: the jurisprudence needs to be put in order; relevant policies underlying the doctrine of sovereign immunity must be identified and weighed; uniformity is essential. There are splits in the circuits on several key standards which must be balanced to make the FSIA fair and manageable.

This is an area of law where the Supreme Court is particularly and uniquely suited to enter in and announce standards. Can we imagine that the courts of Angola are better situated to deal with the complexities presented in this suit? Can we imagine that the courts of Italy are better suited to deal with the question of proper operation of U.S. manufactured, assembled and maintained turbine equipment operated by U.S. personnel offshore Angola? A refusal by U.S. courts to accept jurisdiction in this case will mean a denial of justice to Mr. Peré's family (and thousands like them), without good reason.[6]

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[6] Mr. Peré was killed by a defect in a product manufactured and serviced by U.S. corporations. To deny his family's right of recovery flies in the face of justice and the "growing tendency" to protect such victims – in product defect cases, commentators

The Court should take this case up for review.

Respectfully submitted,

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have been counseling against "mechanical and clearly inadequate formulas" in favor of "the application of the law most favorable to the plaintiff." Ehrenzweif and Jayme, *Private International Law* (1977), p. 113.

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APPENDIX A

Nancy G. PERE, on behalf of Marci Danielle Pere, on behalf of Matthew Reed Pere, individually and on behalf of her minor children, Plaintiff-Appellee,

v.

NUOVO PIGNONE, INC., et al., Defendants, Nuovo Pignone S P A, Defendant-Appellant, Coppus Engineering; Tuthill Corporation, Defendants-Appellees.

No. 97-30572.

United States Court of Appeals,
Fifth Circuit.

Aug. 7, 1998.

Appeal from the United States District Court for the Western District of Louisiana.

Before POLITZ, Chief Judge, and JONES and DUHE, Circuit Judges.

DUHE, Circuit Judge:

Appellee's husband was killed while working on a platform off the coast of West Africa when a starter turbine manufactured by Coppus Engineering exploded. The starter turbine was a component of a turbine system designed and manufactured by Nuovo Pignone. Appellee sued for her husband's wrongful death claiming that the starter turbine and turbine system had been improperly designed and/or manufactured. Appellant, Nuovo Pignone, an Italian company, claimed sovereign immunity under the Foreign Sovereign Immunities Act. 28 U.S.C. § 1602, et seq. The district court found that, although Appellant was a foreign state, the commercial activity

exception to immunity applied and Appellant could be sued. We disagree, holding that the Appellee failed to meet her burden of proof that the commercial activity exception applied.

I.

In 1974, Nuovo Pignone, an Italian company that designs and manufactures turbine systems, bought a starter turbine from Coppus Engineering, a United States company. Nuovo Pignone then sold to Cabinda Gulf Oil Company ("CABGOC"), FOB Italy, a turbine system that incorporated the Coppus starter turbine. Nuovo Pignone manufactured, tested, and inspected the turbine system in Italy. It was then sent to Bayou Black, Louisiana for final assembly by CABGOC's contractor onto a platform. The completed platform was sent to CABGOC in the Molongo field off the coast of Angola, West Africa.

In 1993, Marcus Daniel Pere ("Pere") was employed by Chevron Overseas Petroleum and/or CABGOC as an instrument technician in West Africa. Pere's employer ordered him to a gas injection platform to test the gas turbine system. During the test, the starter turbine exploded killing Pere. Pere's widow sued[1] on behalf of herself and her two children claiming that the Coppus turbine and Nuovo Pignone's turbine system caused

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[1] Coppus Engineering is also suing; however, it is doing so to ensure that Nuovo Pignone remains a party to the litigation. To avoid confusion, this opinion will treat Coppus' arguments as Pere's.

Pere's death because they had been defectively designed and/or manufactured.

Nuovo Pignone moved for summary judgement claiming sovereign immunity by contending it was an agent or instrumentality of the Italian government. It established that Ente Nazionale Idrocaburi ("ENI") was the majority shareholder at the time of the accident and that the Republic of Italy created ENI to lead Italy's oil and gas exploration and development. Thus, Nuovo Pignone argued, because ENI is an agent or instrumentality of the Italian government, it was a foreign state entitled to immunity. The district court agreed. It, however, denied Nuovo Pignone's request for dismissal concluding that Nuovo Pignone was not entitled to sovereign immunity because of its commercial activities in the United States. Nuovo Pignone appeals.

II.

The Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1602 et. seq., provides the sole basis for obtaining jurisdiction over a foreign state. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989). The FSIA includes agents or instrumentalities[2] of a foreign state within the

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[2] 28 U.S.C. § 1603(a), (b)(1), (b)(2) provide:

(a) A "foreign state" . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

definition of "foreign state". To bring suit, the plaintiff must establish that one of the exceptions listed in §§ 1605 and 1607 applies. This Court must decide whether Nuovo Pignone is a foreign state, and if it is, whether it may still be sued under the commercial activity and implicit waiver exceptions, *see* § 1605(a)(1), (2) infra.

A. STANDARD OF REVIEW

We review a district court's application of the FSIA de novo. *Tubular Inspectors, Inc. v. Petroleos Mexicanos*, 977 F.2d 180, 184 (5th Cir.1992).

B. ANALYSIS

1. Whether the FSIA Applies

Pere argues that the district court erred in applying the FSIA because it looked to Nuovo Pignone's ownership at the time the explosion occurred, rather than at the time suit was filed. When Pere sued, Nuovo Pignone was no longer a foreign state because ENI had transferred a majority of the Nuovo Pignone stock to a consortium of private companies. In support of her argument, Pere cites *Straub v. A.P. Green*, 38 F.3d 448 (9th Cir.1994) which

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(b) An "agency or instrumentality of a foreign state" means any entity –

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof[.]

looked at the defendant's identity at the time suit was filed. She acknowledges that *General Electric Capital Corp. v. Grossman*, 991 F.2d 1376 (8th Cir.1993) holds that whether an entity qualifies as a foreign sovereign is determined at the time the litigated event occurred. Pere contends, however, that the *Straub* court's reasoning is better because it is more in keeping with the FSIA's legislative history.

The FSIA's purpose was to promote harmonious international relations. *Pullman Construction Industries, Inc. v. United States*, 23 F.3d 1166, 1169 (7th Cir.1994). Pere argues that generally international relations would remain unaffected when a plaintiff sues an entity which was immune at the time of the disputed event but is now private, therefore, giving Nuovo Pignone immunity does not achieve any governmental purpose. We disagree.

Whether the FSIA covers an entity now private that was state owned at the time of the disputed event(s) is a first impression within this Circuit. Having studied both *Straub* and *General Electric*, we are persuaded by the Eighth Circuit's reasoning in *General Electric*. As the Eighth Circuit stated, "the doctrine of foreign state sovereign immunity was created to effectuate general notions of comity among nations." *Id.* at 1381 (internal quotations and citations omitted). The foreign policy concerns underlying sovereign immunity do not necessarily disappear when a defendant loses its foreign status before suit is filed. Thus, courts are to look to the defendant's status at the time the litigated events occurred. *Straub* is distinguishable because it addresses different facts. In *Straub*, the Ninth Circuit was determining how to treat a corporation that became a foreign state for FSIA purposes after

the disputed events occurred but before suit was filed.[3] *Straub*, 38 F.3d at 451. We, therefore, affirm the district court's finding that Nuovo Pignone is a foreign state under the FSIA.

2. FSIA Exceptions

a. Commercial Activity

The district court found that the "commercial activities" exception to the FSIA applied. Under § 1605(a)(2), a foreign state is not immune when the action is:

> "based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

"Commercial activity" is defined as "a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d). In determining the commercial character of an activity, courts look to the nature rather than the purpose of the act or transaction. *Id.* For the commercial activity exception to apply here, Nuovo Pignone's actions must fall within the second listed exception. In other words, the suit must be "based upon . . . an act performed within the United States in

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[3] This opinion does not address such a situation.

connection with a commercial activity of the foreign state elsewhere". The district court correctly found that the commercial activity upon which the plaintiff's cause of action was based was the design and manufacture of turbine systems. It further found that the act performed in the United States in connection with that activity was Nuovo Pignone's sending a representative to Bayou Black to consult in the final assembly of the system onto the platform. We disagree.

We turn first to the issue of each party's burden of proof. Initially, the party seeking immunity must show the district court that it is a foreign state potentially entitled to immunity under the FSIA. Once that party makes such a showing, the burden shifts to the opposing party to raise the exceptions to sovereign immunity and to assert facts that would establish these exceptions. The ultimate burden of proving that the FSIA applies, though, remains upon the party seeking immunity. *Stena Rederi AB v. Comision de Contratos del Comite Ejecutivo General del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mexicana*, 923 F.2d 380, 390 n. 14 (5th Cir.1991); *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 533 (5th Cir.1992). Here, Nuovo Pignone has proven that it is a foreign state entitled to immunity; thus, the burden has shifted to Pere to prove that Nuovo Pignone performed an act within the United States in connection with the commercial activity performed elsewhere. Pere asserts that Nuovo Pignone's sending representatives to Bayou Black, Louisiana to consult on the final assembly was such an act. Assuming arguendo that the consultation was a commercial act performed within the United States, Pere still fails to meet her burden of proof.

To determine whether the availability to consult during the Bayou Black assembly was in connection with Nuovo Pignone's design/manufacture in Italy, we look to our prior cases to find the definition of "in connection with". In *Stena*, we held that the connection between the commercial activity and the plaintiff's complaint had to be material. *Id.* at 387. However, when the "in connection with" prong applies, "any material connection between 'commercial activity elsewhere' and the plaintiff's complaints . . . is irrelevant to the determination of subject matter jurisdiction." *Id.* at 388. Under this prong, the material connection must exist between the act performed in the United States and plaintiff's cause of action. Here, then, the material connection must exist between the availability for consultation during final assembly in Bayou Black and Pere's allegations of wrongful death due to improper design and/or manufacture. Pere fails to show such a material connection. The components of the turbine system were manufactured, tested, and delivered to CABGOC in Italy. More importantly, once the components arrived in Bayou Black, Nuovo Pignone did not perform the final assembly; rather, it was CABGOC's contractor who performed this task. Concededly, Nuovo Pignone did send representatives to consult on the mechanical erection of the components onto the platform; however, there is no indication in the record concerning the extent or nature of the consultation or to show it as an integral part of the design or manufacture. While this Court is told that the Nuovo Pignone representatives consulted, we are left to guess at what the consultation involved. There is simply no indication that the final assembly in Bayou Black was a part of the design or

manufacture that occurred in Italy. Thus, we cannot say that there is a material connection between Nuovo Pignone sending consultants to Bayou Black and Pere's wrongful death action.

b. Waiver

Pere argues that the district court did not have to consider the commercial activity exception because Nuovo Pignone has implicitly waived its immunity. The FSIA allows a foreign state to waive its immunity either explicitly or implicitly, 28 U.S.C. § 1605(a)(1), but it does not state how implicit waiver occurs. The legislative history reveals, though, that implicit waiver may be found in three situations: 1) when a foreign state agrees to arbitration in another country; 2) when a foreign state agrees that the laws of another country govern a contract; and 3) when a foreign state files a responsive pleading without raising the immunity defense. H. Rep. No. 1487, 94th Cong.2d Sess. 18, reprinted in 1976, U.S.C.C.A.N. 6604, 6617. *See also, Arriba Ltd.*, 962 F.2d at 539 n. 22. The waiver exception is to be narrowly construed. *Joseph v. Office of Consulate General of Nigeria*, 830 F.2d 1018, 1022 (9th Cir.1987).

Here, Pere argues that Nuovo Pignone implicitly waived its sovereign immunity by virtue of a 1985 contract it made with CABGOC. That contract concerned the overhaul of the FC-1C compressor train that included the starter turbine that exploded. In provision 19 of that contract, Nuovo Pignone agreed that the laws of Texas would govern questions concerning the performance or

execution of the overhaul contract. Pere contends that this provision is an implied waiver. We disagree.

First, in cases in which implied waiver based upon a contract has been found, the contract was between the parties suing and being sued. *See Eckert International v. The Government of the Sovereign Democratic Republic of Fiji*, 32 F.3d 77 (4th Cir.1994); *Joseph v. Office of Consulate General of Nigeria*, 830 F.2d 1018 (9th Cir.1987); *Kramer v. Boeing, Co.*, 705 F.Supp. 1392 (D.Minn.1989). That is not the case here. Moreover, when courts analyze whether a contract's choice of law provision constitutes implicit waiver, they look to the implied intent of the parties. *See Eckert Int'l*, 32 F.3d at 80. Having studied the 1985 agreement, we find no implied intent of Nuovo Pignone to be responsible to third parties. Hence, Nuovo Pignone has not impliedly waived its sovereign immunity.

CONCLUSION

For the reasons stated, we AFFIRM IN PART, REVERSE IN PART and REMAND.

APPENDIX B

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE/OPELOUSAS DIVISION

NANCY G. PERÉ, ET UX	CIVIL ACTION NUMBER: 94-1889
VERSUS	
NUOVO PIGNONE, INC., ET AL	JUDGE DOHERTY
	MAGISTRATE JUDGE METHVIN

MEMORANDUM RULING

(Filed Apr. 30, 1997)

Before this Court is Defendant's Nuovo Pignone S.p.A.'s ("Nuovo Pignone") Motion for Summary Judgment. Nuovo Pignone contends that it is immune under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S. C. § 1602, et seq., and therefore this Court lacks jurisdiction over plaintiff's, Nancy G. Peré's, complaint against Nuovo Pignone. Plaintiff opposes this motion and submits a cross-motion for summary judgment contending Nuovo Pignone is not entitled to immunity under the FSIA. Defendants Coppus Engineering and Tuthill Corporation have also submitted an opposition to Nuovo Pignone's Motion for Summary Judgment.

Facts

The relevant, undisputed facts of this matter are as follows. Marcus Daniel Peré was employed by Chevron

Overseas Petroleum and/or Cabinda Gulf Oil Co. ("CABGOC"), a division of Chevron, as an instrument technician in West Africa. On the morning of October 16, 1993, Peré was ordered to gas injection platform FOX ("GIP-FOX"), located approximately seven to ten miles off the coast of Cabinda, Angola (the coast of West Africa), to administer testing procedures on a gas turbine system. An explosion occurred during this procedure, killing Peré. Peré's widow, Nancy Peré, brings this suit.

Plaintiff's claim is that a defectively manufactured and/or designed turbine system caused the accident and death of Peré; consequently, the Court will review the history of the turbine system. Coppus Engineering, and its successor corporation, Tuthill, is a United States manufacturer of starter turbines, which are part of the subject turbine system. Nuovo Pignone is an Italian company that designs and manufactures turbine systems. AGIP, USA is a United States company that serves as a procurement agent; it receives orders from foreign clients and procures the necessary parts and products from United States vendors. Cabinda Gulf Oil Company is an oil company operating, in all matters relevant to this action, off the coast of West Africa.

AGIP, USA placed an order for starter turbines with then Coppus Engineering Corporation ("Coppus") on behalf of Nuovo Pignone, located in Italy. Coppus delivered the starter turbines to AGIP, a delivery which included the subject starter turbine, in approximately July of 1974, and they were then apparently shipped to Nuovo Pignone in Italy by AGIP.

Nuovo Pignone entered into an agreement with Cabinda Gulf Oil Company ("CABGOC") for the sale of the subject turbine system. Nuovo Pignone then partially manufactured and assembled the turbine systems and shipped incomplete packages to Bayou Black, Louisiana for final manufacturing and assembly onto the gas injection platform. Nuovo Pignone provided personnel to assist in the installation of the turbine systems on the platform. After completion and assembly on the platform, the completed platform was shipped from Bayou Black, Louisiana to CABGOC in the Molongo Field in Cabinda, Angola, off the coast of West Africa.

Nancy G. Peré brought this action on October 17, 1994, on behalf of herself as the spouse of decedent and as the mother of their two children. Plaintiff filed suit against various entities for damages resulting from the death of Peré.[1] Plaintiff sued Nuovo Pignone, Inc. (an

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[1] Plaintiff's original Complaint filed in this Court seeks recovery under only the Death on the High Seas Act, 46 U.S.C. 761 et seq., and does not detail in any fashion the nature and involvement of the various defendants sued. However, plaintiff also filed suit against the same defendants in two United States District Courts for the Southern District of Texas – before Judge Kent of the Galveston Division and Judge Rosenthal of the Houston Division. Judge Kent dismissed the Galveston action without prejudice based upon the pendency of the Houston action. Judge Rosenthal dismissed the Houston action based upon the pendency of the action before this Court, however, Judge Rosenthal then later reinstated the Houston action and transferred it pursuant to 28 U.S.C. § 1404(a) to this Court. On June 14, 1995, this Court noted that the transferred Houston action and the action now before this Court were identical and ordered that the Houston action be closed and all documents filed in the action now pending before this Court. Therefore, the

Italian corporation also identified as Nuovo Pignone, S.p.A.) Pignone, Inc. (a United States corporation), and Coppus Engineering, Inc. (a United States corporation) as designers and manufacturers of the subject turbine system. Nuovo Pignone was 69% owned by Ente Nazionale Idrocaburi ("ENI") at the time of the explosion giving rise to plaintiff's cause of action. ENI is a joint stock company reporting to the Minister of Treasury in Italy.

Plaintiff also sued Tuthill Corp., as a successor corporation of Coppus Engineering. Plaintiff initially sued AGIP Petroleum Co., Inc., however, said company was voluntarily dismissed on August 9, 1995. Order granting plaintiff's Motion to Dismiss Defendant AGIP Petroleum Co., Inc. without prejudice (No. 18). Plaintiff then amended her Complaint to add as defendant AGIP, USA, Inc., on January 19, 1996. Second Amended Complaint (No. 27).

Analysis

Nuovo Pignone and the plaintiff have styled their FSIA-based motions as motions for summary judgment.

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complaints filed in this Court and in the Houston action have been consolidated. The Complaint brought in the Houston action listed several theories of recovery that are not present in the Complaint filed originally in this Court. In the Houston action, the plaintiff brought claims for strict products liability, negligence, gross negligence, violations of the Texas Deceptive Trade Practices Act, and for breach of express or implied warranties. There was no claim brought under the DOHSA. In addition, plaintiff provided much greater detail in the Houston action regarding the identity of the various defendants sued and the basis for plaintiff's claims against them.

However, Nuovo Pignone's motion is more properly brought as a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. Pro. 12(b)(1). Plaintiff's cross-motion for summary judgment in opposition to Nuovo Pignone's motion is more properly considered as an opposition to Nuovo Pignone's motion to dismiss.

Case law has established the respective burdens when a defendant claims immunity based upon the FSIA. The defendant. asserting immunity carries the burden of persuading the court that it is so entitled. *Forsythe v. Saudi Arabian Airlines Corp.*, 885 F.2d 285, 289 n. 6 (5th Cir. 1989) (*per curiam*). However, once the defendant makes a prima facie showing of entitlement to FSIA immunity, the plaintiff must then assume the burden of producing facts sufficient to show that an exception to immunity exists. *Id.; Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 533 (5th Cir. 1992). The ultimate burden of proof on immunity remains at all times on the defendant. *Petroleos Mexicanos*, 962 F.2d at 533; *Forsythe*, 885 F.2d at 289 n. 6.

In determining whether a defendant is entitled to immunity, and thus whether the court retains subject matter jurisdiction over the plaintiff Is claims against the defendant, "a district court may rely not only on the pleadings; it may consider conflicting evidence – contained in affidavits, for example – and make its own resolution of disputed jurisdictional facts." *Forsythe*, 885 F.2d at 289 n. 6 (citing *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir.), *cert. denied*, 454 U.S. 897, 102 S.Ct. 396, 70 L.Ed.2d 212 (1981)).

I. Nuovo Pignone's Status as a Foreign State

Congress passed the FSIA in 1976 as a codification of the "restrictive theory" of foreign sovereign immunity. *Stena Rederi A.B. v. Comision de Contratos*, 923 F.2d 380, 384-86 (5th Cir. 1991). Under the "restrictive theory," "a foreign state's immunity from suit in this country does not extend to acts that are private in nature, such as commercial activities, as opposed to those that are public in nature." *Coleman v. Alcolac, Inc.*, 888 F.Supp. 1388, 1399 (S.D. Tex. 1995) (citing *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 487, 103 S.Ct. 1962, 1967, 76 L.Ed.2d 81 (1983)). The FSIA provides when and how parties can bring actions against foreign states or their entities in the courts of the United States or the various States, and also provides when such foreign states are entitled to sovereign immunity. *Alcolac, Inc.*, 888 F.Supp. at 1399 (citing *Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061, 1064 (5th Cir.), *cert. denied*, 506 U.S. 867, 113 S.Ct. 193, 121 L.Ed.2d 136 (1992) (quoting H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 6, reprinted in 1976 U.S. Code Cong. & at Mem. News 6604 (1976))). The FSIA provides plaintiffs their sole basis for obtaining jurisdiction over foreign state defendants in both federal and state court. 28 U.S.C. § 1602.

The FSIA provides immunity only for "foreign states." 28 U.S.C. § 1602. The Act defines a "foreign state":

> (a) A "foreign state", except as used in § 1806 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

> (b) An "agency or instrumentality of a foreign state" means any entity –
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in § 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603.

Nuovo Pignone contends that at the time of the accident in question, it was majority-owned by Ente Nazionale Idrocaburi ("ENI"). Nuovo Pignone further contends that ENI is an entity created by the Republic of Italy to lead Italy's endeavors in the fields of oil and gas exploration and development. Therefore, Nuovo Pignone contends that it was majority-owned by ENI, an agency or instrumentality of Italy, and that it is therefore a foreign state under the FSIA and entitled to immunity. It is undisputed that ENI is an agency or instrumentality of Italy.

Plaintiff contends Nuovo Pignone is not a foreign state under the FSIA. First, plaintiff argues that Nuovo Pignone has not carried its burden to establish that it was majority-owned by ENI at the time of the accident, and that therefore Nuovo Pignone cannot claim that it was owned by Italy at the time of the accident and therefore entitled to immunity.

Second, plaintiff contends that even if Nuovo Pignone has carried its burden to establish that it was owned by ENI at the time of the accident, Nuovo Pignone is still not entitled to immunity under the FSIA. Plaintiff contends that ENI is an agency or instrumentality of Italy, and not Italy or a political subdivision of Italy, and therefore Nuovo Pignone cannot qualify as an "agency or instrumentality of a foreign state" as a majority of its shares are not owned by a foreign state or political subdivision thereof. 28 U.S.C. § 1603(b).

Finally, plaintiff contends that the question is not whether Nuovo Pignone qualified as a foreign state at the time of the events giving rise to this action, but whether Nuovo Pignone qualified as a foreign state at the time plaintiff filed this action. Plaintiff contends Nuovo Pignone was owned by a consortium led by General Electric as of the time of filing of plaintiff Is action, and not by Italy or even an "agency or instrumentality" of Italy, and therefore cannot qualify as a foreign state.

Plaintiff's first argument is easily rejected. Nuovo Pignone has carried its burden to establish that it was majority-owned by ENI at the time of the events giving rise to this action. The explosion which forms the basis of plaintiff's claim occurred on October 16, 1993. Nuovo Pignone has produced uncontradicted evidence that it was majority-owned by ENI at least as late as December of 1993. Nuovo Pignone's Mem. in Supp., Exhibit A at 29 (No. 56). Nuovo Pignone has also produced evidence that before the sale of Nuovo Pignone stock to the private consortium led by General Electric, ENI owned 69% of

Nuovo Pignone's stock. *Id.*, Exhibit B at 46. Nuovo Pignone has produced evidence that its sale to the consortium led by General Electric was not officially announced until December 22, 1993, and that the contract was perhaps not final until May 24, 1994. *Id.* at 59-61. Nuovo Pignone has carried its burden to establish that it was majority-owned by ENI at the time of the events giving rise to plaintiff's action.

A. Tiering

A more difficult question is whether Nuovo Pignone, as an entity majority-owned by an agency or instrumentality of Italy ("ENI") and not Italy itself or a political subdivision thereof can be considered a foreign state under the FSIA. This problem of indirect ownership of entities by foreign states through intermediary "agencies or instrumentalities" has been referred to as one of "tiered" ownership. Plaintiff cites *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995), in support of her argument that Nuovo Pignone cannot be considered an agency or instrumentality of Italy as Nuovo Pignone is not owned by Italy or a political subdivision thereof, but rather ENI, an agency or instrumentality of Italy.

In *Gates*, the Ninth Circuit considered whether Fletcher's Fine Foods ("FFF"), a pork processing plant headquartered in British Columbia, qualified as a foreign state under the FSIA. Alberta Pork Producers Development Corporation ("Alberta Pork"), found to be an agency or instrumentality of Canada, owned 100% of the shares of FFF.

The Ninth Circuit noted first that FFF, "an ordinary pork processing plant," could not be considered an "organ" of the province of Alberta. *Gates*, 54 F.3d at 1461. Therefore, FFF could only qualify for immunity under the FSIA if it was found to be an agency or instrumentality of the foreign state. To so qualify, the majority of FFF's shares would have to be owned by "a foreign state or political subdivision thereof." The Ninth Circuit then noted that FFF was wholly owned by Alberta Pork, that Alberta Pork was not a foreign state or political subdivision thereof, but rather an agency or instrumentality of a foreign state. *Id.* at 1462. The Ninth Circuit went on to state:

> One might argue that once we determine that Alberta Pork is an agency or instrumentality, then it ipso facto becomes a foreign state or political subdivision thereof. However, the literal language of the statute requires us to reject that argument. First, the statute provides that a foreign state includes an agency or instrumentality, not that it is an agency or instrumentality or that it is defined as an agency or instrumentality. Second, the remainder of the statute contradicts any interpretation that would equate "an agency or instrumentality" with "a foreign state." If Congress had intended "agencies or instrumentalities of a foreign state" to mean "a foreign state" for the purposes of § 1603, then it also would have intended a "political subdivision" to mean "a foreign state" because § 1603(a) defines a foreign state as including both "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." The statutory language strongly

> indicates that Congress did not intend this interpretation, however, because the remainder of the section differentiates between "foreign states" and "political subdivisions thereof."

Id. The Ninth Circuit quoted from the legislative history of the FSIA in support of its argument:

> The second criteria requires that the entity be either an organ of a foreign state (or of a foreign state's political subdivision), or that a majority of the entity's shares or other ownership interest be owned by a foreign state (or by a foreign state's political subdivision). If such entities are entirely owned by a foreign state, they would of course be included within the definition. Where ownership is divided between a foreign state and private interests, the entity will be deemed to be an agency or instrumentality of a foreign state only if a majority of the ownership interest (shares of stock or otherwise) is owned by a foreign state or by a foreign state's political subdivision.

Id. (quoting from the House Report, 1976 U.S.C.C.A.N. 6604, 6614). The Ninth Circuit stated that to find an entity owned by an agency or instrumentality of a foreign state to be an agency or instrumentality of a foreign state *itself* would be to impermissibly expand the extent of potential immunity beyond the intent of Congress in enacting the FSIA.

The Fifth Circuit has not addressed this issue. However, it can fairly be said that *Gates* is relatively isolated. The Seventh Circuit in *In re Air Crash Disaster Near Roselawn, Indiana on October 31, 1994*, 96 F.3d 932 (7th Cir. 1996), rejected the *Gates* construction:

> *Gates* concludes that the phrase "or political subdivision of" limits "foreign states" as used in § 1603(b)(2) to "foreign government." This conflicts with our construction of the FSIA in *Allen Dale Mut. Ins. Co. v. Bull Data Systems. Inc.*, 10 F.3d 425 (7th Cir. 1993), in which we considered whether two Zenith companies were "foreign states" under the FSIA. Each was 100% owned by another, single corporation, which in turn was 90% owned by France. We ruled that the two Zenith companies were "foreign states" under § 1603(b)(2) because "the Act's definition includes companies a majority of whose shares are owned by a foreign state." *Id.* at 427. *See also State Bank of India v. NLRB*, 808 F.2d 526, 535 (7th Cir. 1986) (State Bank of India a "foreign state" under FSIA because it was 92% owned by Reserve Bank of India, which is in turn owned by India), *cert. denied*, 483 U.S. 1005, 107 S.Ct. 3229, 97 L.Ed.2d 735 (1987). . . . Our reading of the Act also comports with the construction other courts have given it in similar circumstances. *E.g. Antoine v. Atlas Turner, Inc.*, 66 F.3d 105, 109 (6th Cir. 1995) (corporation owned by another corporation in turn owned by political subdivision of foreign state is "instrumentality of a foreign state"); [*Straub v. A.P. Green, Inc.*, 38 F.3d 448, 451 (9th Cir. 1994) (same)]. . . .

In re Air Crash Disaster, 96 F.3d at 941 (some citations omitted). In essence, the Seventh Circuit found the use of the word "includes" in § 1603(a) evinces Congress' intent to broadly define 'foreign state.' " *Id.* at 940.

> This is consistent with the statement in the legislative history that instrumentalities could assume "a variety of forms" (H Rep. at 6614), including "a transport organization such as

> [a]n . . . airline." Plaintiffs claim that the reference to "political subdivisions" in § 1603(b)(2) is rendered superfluous (or at least redundant) by the district court's construction. Even if so construed, it cannot alter our reading of the entirety of the FSIA, in which corporations with ATR's precise characteristics may be considered an agency or instrumentality of a foreign state.

In re Air Crash Disaster, 96 F.3d at 940-41.

The *Gates* court's statutory interpretation argument is strong and persuasive. *See Gardiner Stone Hunter Int'l v. Iberia Lineas Aereas de Espana, S.A.,* 896 F.Supp. 125, 130-31 (S.D.N.Y. 1995) (finding the *Gates* tiering argument persuasive, but finding no "foreign state" status on other grounds as well). It seems that the language of the FSIA, by defining an "agency or instrumentality" as an entity majority-owned by a "foreign state or political subdivision thereof," does not allow for finding an entity an "agency or instrumentality" if its shares are majority-owned by a "agency or instrumentality" of a foreign state, and not by a "foreign state or political subdivision thereof."

However, the weight of authority seems to be against this interpretation of the FSIA. District courts within the Fifth Circuit have found that entities indirectly owned by a foreign state are "agencies or instrumentalities" of foreign states. *See Delgado v. Shell Oil Co.,* 890 F.Supp. 1315, 1318 n. 5 (S.D. Tex. 1995); *Talbot v. Saipem A.G.,* 835 F.Supp. 352, 353 n. 2 (S.D. Tex. 1993). Moreover, it appears from the text of the FSIA as a whole and its legislative history that Congress intended entities whose shares are majority-owned by a foreign state to be considered

"agencies or instrumentalities" of the foreign state. To say an "agency or instrumentality" of a foreign state wholly owns another entity, and not the foreign state or one of its political subdivisions, does not necessarily lessen the foreign state's control of the latter entity. Rather, the foreign state still owns a majority of the shares of the latter entity, it simply does so through an intermediary. If this Court were confronted with a situation where an entity barely owned by a "foreign state or political subdivision thereof" itself has a bare majority interest in another entity, an entity which then claims status itself as an "agency or instrumentality," this Court's finding might differ. However, ENI is an entity created by Italy and reporting to the Minister of Treasury. ENI is 100% owned by the Minister of Treasury of the Republic of Italy. ENI had a 69% interest in Nuovo Pignone at the time of the incident giving rise to this action. Therefore, Italy majority-owned Nuovo Pignone, and Nuovo Pignone was an "agency or instrumentality" of Italy.

B. Timing

Plaintiff next argues Nuovo Pignone is not entitled to immunity as a "foreign state" under the FSIA because Nuovo Pignone was not majority-owned by Italy at the time of plaintiff's filing of suit.[2] It is undisputed that

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[2] Plaintiff also seems to argue that Nuovo Pignone has presented no evidence regarding its ownership at the time of the design and manufacture of the starter turbine in question. However, this Court easily dismisses that argument as plaintiff's claim is necessarily based upon the explosion off the coast of West Africa which resulted in the death of Peré, and not

Nuovo Pignone was owned by a private consortium led by General Electric at the time of plaintiff's filing. Plaintiff presents only one case in support of her argument. In *Straub v. A. P. Green, Inc.*, 38 F.2d 448 (9th Cir. 1994), the Ninth Circuit held "the FSIA applies when a party is a foreign state at the time the lawsuit is filed, even if that party was not a foreign state at the time of the alleged wrongdoing." *Id.* at 451. The Ninth Circuit did not hold the FSIA applies only if a party is a foreign state at the time the lawsuit is filed. Indeed, the Ninth Circuit noted its decision did not conflict with those of the only other circuits to address the issue.

> The Sixth and Eighth Circuits felt that the FSIA is applicable where a defendant is a foreign state at the time of the alleged wrong doing. *See General Elec. Capital Corp. v. Grossman*, 991 F.2d 1376 (8th Cir. 1993); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445 (6th Cir. 1988).

Straub, 38 F.3d at 451. *Straub* argues for a broader application of the FSIA, and not a narrowing of its application.

This Court is persuaded by the reasoning of the Eighth Circuit in *General Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1380-82 (8th Cir. 1993), in which the court noted the foreign policy concerns of the FSIA and the fact that these concerns do not necessarily dissipate once an entity leaves the control of the foreign state. Therefore, this Court concurs with the holdings of the Sixth and Eighth Circuits, and in the absence of any contrary authority, finds the time when the events occurred giving

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upon some hypothetical and unidentified time in the past when the starter turbine was designed or manufactured.

rise to this action is the time this Court should consider in determining whether the FSIA applies. As seen earlier, Nuovo Pignone was majority-owned by Italy at the time of the events giving rise to this action, and therefore the FSIA applies.

II. "Commercial Activities" Exception to Sovereign Immunity

Under the FSIA, Nuovo Pignone as a foreign state is immune from the jurisdiction of the courts of the United States. 28 U.S.C. § 1604. This Court may only exercise subject matter jurisdiction over Nuovo Pignone if an exception to sovereign immunity applies. *Id.* § 1330(a). *See Stena Rederi A.B. v. Comision de Contratos,* 923 F.2d 380, 386 (5th Cir. 1991). One of the exceptions to sovereign immunity recognized by the FSIA is "a broad 'commercial activities' exception: Foreign sovereigns are not immune from judicial process in any case in which the action is based upon commercial activity that has a jurisdictional nexus with the United States. [28 U.S.C. § 1605(a)(2)]." *Stena Rederi,* 923 F.2d at 386. The Fifth Circuit has emphasized that the sovereign's commercial activity must have "a sufficient connection – a 'jurisdictional nexus' – with the United States." *Id.* The FSIA identifies three commercial acts sufficiently connected to the United States to satisfy the jurisdictional nexus requirement:

> (1) A commercial activity carried on in the United States;

> (2) An act performed in the United States in connection with a commercial activity carried on outside the United States; and
>
> (3) A commercial activity carried on outside the United States that has a direct effect in the United States.

28 U.S.C. § 1605(a)(2).

A foreign sovereign's commercial activity in the United States is not enough to remove that sovereign's immunity under the commercial activities exception. There must be a material connection between the plaintiff's cause of action and the defendant sovereign's commercial acts in the United States.

> A foreign sovereign, however, does not abrogate its sovereign immunity simply because it conducts commercial operations that have a connection with the United States. Not only must there be a jurisdictional nexus between the United States and the commercial acts of a foreign sovereign, there must be a connection between the plaintiff's cause of action and the commercial acts of the foreign sovereign. . . . In order to satisfy the commercial activities exception to sovereign immunity, the commercial activity that provides the jurisdictional nexus with the United States must also be the activity on which the lawsuit is based.
>
> The requirement under the FSIA of a connection between the plaintiff's cause of action and the commercial acts of the foreign sovereign is a significant barrier to the exercise of subject matter jurisdiction in United States courts. We do not suggest that the commercial activities exception requires a direct causal connection. . . .

> Nonetheless, the connection between the cause of action and the sovereign's commercial acts in the United States must be material. Isolated or unrelated commercial actions of a foreign sovereign in the United States are insufficient to support a commercial activities exception to sovereign immunity.

Stena Rederi, 923 F.2d at 386-87 (citations omitted).

In the instant case, Nuovo Pignone does not dispute that it carries on commercial activity in the United States. The commercial activity related to the plaintiff's cause of action against Nuovo Pignone is the design and manufacture of turbine systems for mineral production. Nuovo Pignone does dispute that any of its commercial activities in the United States concerned the design and manufacture of the subject turbine system. This is a commercial activity routinely engaged in by private companies throughout the world. A " 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). This Court is satisfied that Nuovo Pignone's alleged design and manufacture of gas turbine systems is a commercial activity as defined by the FSIA.

What remains to be decided is whether Nuovo Pignone engaged in the commercial activity of designing and manufacturing gas turbine systems in the United States, and whether there is a material connection between this commercial activity and the plaintiff's cause of action.

The plaintiff presents evidence that the gas turbine system on which Peré was working when the explosion occurred was shipped from Italy to Bayou Black, Louisiana for final assembly before being shipped to West Africa. Plaintiff's Mem. in Opp., Exhibit J at 40-46 (No. 59). In addition, Nuovo Pignone sent a representative to Louisiana to supervise or consult in the assembly of the component parts of the turbine system onto a platform. *Id.* at 82-83. While this Court cannot know that Nuovo Pignone's commercial activity in Louisiana regarding the turbine system has a direct causal connection to the explosion of the turbine system that forms the basis of plaintiff's action, this Court *is* convinced there is a material connection between the plaintiff's cause of action and Nuovo Pignone's commercial acts regarding the subject turbine system in the United States. This Court finds the commercial activity exception applies and Nuovo Pignone is thus not immune from judicial process in this action.

Conclusion

Nuovo Pignone is a foreign state for purposes of this action, however, it engaged in commercial activity in the United States materially connected to the plaintiff's cause of action, and it is therefore not entitled to immunity under the FSIA. Nuovo Pignone's Motion for Summary Judgment is DENIED. Plaintiff's Motion for Summary Judgment upon the FSIA immunity is in reality an opposition to Nuovo Pignone's motion, and not properly a Motion for Summary Judgment, and is therefore DENIED as well.

THUS DONE AND SIGNED this 29 day of April, 1997.

/s/ Rebecca F. Doherty
REBECCA F. DOHERTY
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE/OPELOUSAS DIVISION

NANCY G. PERÉ, ET UX	CIVIL ACTION NUMBER: 94-1889
VERSUS	
NUOVO PIGNONE, INC., ET AL	JUDGE DOHERTY
	MAGISTRATE JUDGE METHVIN

ORDER

(Filed Apr. 30, 1997)

Considering the foregoing Memorandum Ruling;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Nuovo Pignone's Motion for Summary Judgment is DENIED. Plaintiff's Motion for Summary Judgment upon the FSIA immunity is in reality an opposition to Nuovo Pignone's motion, and not properly a Motion for Summary Judgment, and is therefore DENIED as well.

Lafayette, Louisiana this 29 day of April, 1997.

/s/ Rebecca F. Doherty
REBECCA F. DOHERTY
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

NANCY G. PERE', Individually and on behalf of her minor children, MATTHEW REED PERE' and MARCI DANIELLE PERE'	**Civil Action No:CV94-1889** **Division: L-O**
versus	**Judge Rebecca F. Doherty**
NUOVO, PIGNONE, INC., PIGNONE, INC., COPPUS ENGINEERING, TUTHILL CORPORATION, AGIP PETROLEUM COMPANY, INC., ABC INSURANCE COMPANY, DEF INSURANCE COMPANY, GHI INSURANCE COMPANY, JKL INSURANCE COMPANY, MNO INSURANCE COMPANY	**Magistrate Judge Methvin**

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ORDER

(Filed Sep. 21, 1998)

Considering the Motion for Entry of Judgment on behalf of Nuovo Pignone, S.p.A.:

IT IS ORDERED AND ADJUDGED that all claims of plaintiffs and all claims of cross-claimants against Nuovo Pignone, S.p.A. are hereby dismissed with prejudice. The Clerk is instructed to enter a Judgment dismissing the action as to defendant. Nuovo Pignone, S.p.A.

Lafayette, Louisiana, this 21 day of Sept, 1998.

/s/ Rebecca F. Doherty
Judge Rebecca F. Doherty

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NANCY G. PERE', individually and on behalf of her minor children, MATTHEW REED PERE' and MARCI DANIELLE PERE'	CIVIL ACTION NUMBER: H 94 3550 JURY
VERSUS	COMPLAINT
NUOVO PIGNONE, INC., PIGNONE, INC., COPPUS ENGINEERING, TUTHILL CORPORATION, AGIP PETROLEUM COMPANY, INC., ABC INSURANCE COMPANY, DEF INSURANCE COMPANY, GHI INSURANCE COMPANY, JKL INSURANCE COMPANY, MNO INSURANCE COMPANY	JUDGE MAGISTRATE

****

COMPLAINT FOR DAMAGES

(Filed Oct. 19, 1994)

The complaint of **NANCY G. PERE'**, a person of the full age of majority and a domiciliary of Vermilion Parish, Louisiana, who brings this suit individually, and on behalf of her minor children, **MATTHEW REED PERE'** and **MARCI DANIELLE PERE' (Petitioners)** respectfully avers the following:

JURISDICTION

1.

This court is vested with jurisdiction over this matter pursuant to 28 USC 1332 since there exists complete diversity between the parties. The matter in controversy exceeds $50,000.00.

VENUE

2.

This proper venue for this action if [sic] the United States District Court for the Southern District of Texas, Houston Division, in accordance with 28 USC 1391.

PARTIES

3.

Made Defendants are:

a) **NUOVO PIGNONE, INC., a foreign corporation doing business in the State of Texas as PIGNONE, INC., who is subject to the jurisdiction of this court under the Texas Long Arm Statute;**

b) **PIGNONE, INC., a New York corporation doing business within the State of Texas, WHO IS SUBJECT TO THE JURISDICTION OF THIS COURT UNDER THE TEXAS LONG ARM STATUTE;**

c) **COPPUS ENGINEERING, a foreign corporation doing business within the State of Texas, WHO IS SUBJECT TO THE JURISDICTION OF THIS COURT UNDER THE TEXAS LONG ARM STATUTE;**

d) TUTHILL CORPORATION, A Massachusetts corporation, as the successor corporation of COPPUS ENGINEERING, WHO IS SUBJECT TO THE JURISDICTION OF THIS COURT UNDER THE TEXAS LONG ARM STATUTE;

e) AGIP PETROLEUM COMPANY, INC., a foreign corporation doing business within the State of Texas, WHO IS SUBJECT TO THE JURISDICTION OF THIS COURT UNDER THE TEXAS LONG ARM STATUTE;

f) ABC INSURANCE COMPANY, a foreign or domestic insurance company licensed to do and doing business within the State of Texas, WHO IS SUBJECT TO THE JURISDICTION OF THIS COURT UNDER THE TEXAS LONG ARM STATUTE;

g) DEF INSURANCE COMPANY, a foreign or domestic insurance company licensed to do and doing business within the State of Texas, who is subject to the jurisdiction of this court under the Texas Long Arm Statute;

h) GHI INSURANCE COMPANY, a foreign or domestic insurance company licensed to do and doing business within the State of Texas, who is subject to the jurisdiction of this court under the Texas Long Arm Statute;

i) JKL INSURANCE COMPANY, a foreign or domestic insurance company licensed to do and doing business within the State of Texas, who is subject to the jurisdiction of this court under the Texas Long Arm Statute; and

i) **MNO INSURANCE COMPANY, a foreign or domestic insurance company licensed to do and doing business within the State of Texas, who is subject to the jurisdiction of this court under the Texas Long Arm Statute.**

All of the aforementioned Defendants are liable jointly, severally and insolido for the damages occasioned by the Petitioners.

FACTS

4.

Marcus Daniel Pere´ (Pere) was a resident and domiciliary of Abbeville, Vermilion Parish, Louisiana.

5.

Petitioners' husband and father, Marcus Daniel Pere´ began his employment with Chevron Oil Company (Chevron) on March 7, 1979.

6.

On or about October 16, 1993, Marcus Daniel Pere´ was employed by Cabinda Gulf Oil Company (COPI), a division of Chevron, as an instrument technician in the Malongo maintenance department.

7.

Pere´ was in the course and scope of his employment off the coast of Cabinda, Angola, West Africa on October 16, 1993.

8.

On the morning of October 16, 1993, PERE´ was dispatched to the Gas Injection Platform Fox (GIP-FOX), located approximately 7-10 miles off the coast of Cabinda, Angola, Africa, to administer testing procedures on a gas turbine system. While performing these procedures with a co-employee, Clark Toups, an explosion occurred killing Marcus D. Pere´.

FIRST CAUSE OF ACTION:
STRICT PRODUCTS LIABILITY

9.

The gas turbine system (FC-1C) and its component parts, which are the subject of this suit, were designed, constructed, assembled, manufactured and modified by NUOVO PIGNONE, INC., PIGNONE, INC. and COPPUS ENGINEERING, INC. This turbine and its component parts were defective, unsafe, and inadequate. In the following manner:

1. The design of the turbine system was defective in that it posed the propensity to explode;

2. defendants' failed to adequately warn users of the hazardous propensities which allowed for the turbine to explode;

3. the turbine system described above, had it been properly designed, manufactured and modified, would not ordinarily be inherently dangerous; however, because of its defective design and construction, the turbine system was dangerous to life and limb of MARCUS DANIEL PERE´, who was unaware of its dangers, hazards and perils;

4. the composition of the turbine blades were defectively designed, manufactured and modified;

5. the starter turbine was defectively designed, manufactured, modified and improperly combined with natural gas turbine system (FC-1C); and

6. such other defects as may be identified during further investigation and discovery.

The Defendants' introduced the turbine system into the stream of commerce by selling them to consumers all over the world. The turbine system and its component parts were defectively designed. The design defect rendered the turbine system and its components parts unreasonably dangerous for use by consumers. The defectively designed turbine system and its component parts were producing cause of the damages suffered by the Petitioners.

SECOND CAUSE OF ACTION: NEGLIGENCE

10.

PIGNONE, INC., its parent corporation, NUOVO PIGNONE, INC., COPPUS ENGINEERING, INC., TUTHILL CORPORATION, and AGIP PETROLEUM

COMPANY, INC., are in the business of providing turbine systems for the public. PIGNONE, INC., its parent corporation, NUOVO PIGNONE, INC., COPPUS ENGINEERING, INC., TUTHILL CORPORATION, and AGIP PETROLEUM COMPANY were negligent in designing, manufacturing, modifying, and/or marketing the FC-1C turbine system in question. Specifically, Defendants' designed, manufactured, modified, and/or marketed the turbine system in question without proper regard for the safety of users of the product and members of the public present during their usage specifically, MARCUS DANIEL PERE'. The death of PERE' and the injuries to the Petitioners were proximately caused by the negligence of PIGNONE, INC., NUOVO PIGNONE, INC., COPPUS ENGINEERING, INC., TUTHILL CORPORATION, and AGIP PETROLEUM COMPANY and their insurers, agents, servants, and/or employees, including but not limited to the following acts or omissions:

1. The design of the turbine system was defective in that it posed the propensity to explode;

2. defendants failed to adequately warn users of the hazardous propensities which allowed for the turbine to explode;

3. the turbine system described above, had it been properly designed, manufactured, and modified, would not ordinarily be inherently dangerous however, because of its defective design and construction, the turbine system was dangerous to life and limb of MARCUS DANIEL PERE', who was unaware of its dangers, hazards and perils;

4. the composition of the turbine blades were defectively designed, manufactured and modified;

5. the starter turbine was defectively designed, manufactured, modified and improperly combined with the natural gas turbine system (FC-1C); and

6. such other defects as may be identified during further investigation and discovery.

7. failed to otherwise exercise due care with respect to designing, manufacturing, assembling, customizing and/or modifying and distributing the turbine system in this action; and

8. such other acts of negligence as may be identified during further investigation.

Such negligence by the Defendants' was the proximate cause of the damages sustained by the Petitioners.

GROSS NEGLIGENCE

11.

Additionally, NUOVO PIGNONE, INC., PIGNONE, INC., COPPUS ENGINEERING, INC., TUTHILL CORPORATION, AGIP PETROLEUM COMPANY, ABC INSURANCE COMPANY, DEF INSURANCE COMPANY, GHI INSURANCE COMPANY, JKL INSURANCE COMPANY, and MNO INSURANCE COMPANY and their agents, servants, and/or employees were grossly negligent in designing, manufacturing, modifying and/or customizing and marketing the turbine system made the basis of this suit. By designing, manufacturing, modifying and/or customizing and marketing the turbine system without

proper regard for the safety of users of the turbine systems and those present during its usage, the Defendants displayed such an entire want of care that the design, manufacture, modification, and/or customization and marketing of the turbine system was a result of the conscious indifference to the rights, safety or welfare of MARCUS DANIEL PERE´. Such gross negligence was a proximate cause of the death of MARCUS DANIEL PERE´ and the damages suffered by the Petitioners, pursuant to the provisions of Chapter 41 of the Texas Civil Practice & Remedies Code, the Defendants are liable to the Petitioner for the exemplary damages.

VIOLATIONS OF TEXAS DECEPTIVE TRADE PRACTICES ACT (D.T.P.A.)

12.

In addition to the above stated grounds of liability, NUOVO PIGNONE, INC., PIGNONE, INC., COPPUS ENGINEERING, INC., TUTHILL CORPORATION, AGIP PETROLEUM COMPANY, ABC INSURANCE COMPANY, DEF INSURANCE COMPANY, GHI INSURANCE COMPANY, JKL INSURANCE COMPANY, and MNO INSURANCE COMPANY and their agents, servants, and/or employees also violated the Texas Deceptive Trade Practices – Consumer Protection Act, Article 17.14 et. seq. of the Texas Business and Commerce Code. Specifically, the Defendants engaged in the following false, misleading or deceptive acts or practices:

> § 17.46(b)(5): representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities which they do not have;

§ 17.46(b)(7): representing that goods or services are of a particular standard, quality or grade, or that goods are of the particular style or model, if they are of another;

§ 17.46(b)(9): advertising goods or services with intent not to sell them as advertised;

§ 17.46(b)(23): the failure to disclose the information concerning goods or services which as known as the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed.

Each of the foregoing false, misleading, or deceptive acts was a producing cause of damages suffered by the Petitioners. The Defendants' conduct in the design and manufacturing in the sale of the turbine system in questions [sic] was a producing cause of PERE's death. Therefore, since the Defendants' conduct was "knowing", the Petitioners are entitled to treble damages under the Act, in addition to attorney's fees and costs.

BREACH OF EXPRESS OR IMPLIED WARRANTIES

13.

The Petitioners incorporate each and every allegation contained in the paragraphs above as though again fully set forth.

By engaging in the business of designing, manufacturing, distributing, modifying and/or customizing, marketing, selling and supplying the turbine system, the Defendants, NUOVO PIGNONE, INC., PIGNONE, INC.,

COPPUS ENGINEERING, INC., TUTHILL CORPORATION, AGIP PETROLEUM COMPANY, ABC INSURANCE COMPANY, DEF INSURANCE COMPANY, GHI INSURANCE COMPANY, JKL INSURANCE COMPANY, and MNO INSURANCE COMPANY and their agents, servants, and/or employees expressly and impliedly warranted that such products were free of defects, were of merchantable quality, were suitable for the purpose for which they were fabricated, manufactured, modified, and/or customized and sold, and were safe for use for their intended purpose. The defective condition of the turbine system constituted a breach of the express and implied warranties of merchantability, fitness and suitability for the purpose for which they were sold. This breach of express and implied warranties was a proximate cause of the death of MARCUS DANIEL PERE.

14.

In addition, NUOVO PIGNONE, INC., PIGNONE, INC., COPPUS ENGINEERING INC., TUTHILL CORPORATION, AGIP PETROLEUM COMPANY, ABC INSURANCE COMPANY, DEF INSURANCE COMPANY, GHI INSURANCE COMPANY, JKL INSURANCE COMPANY, and MNO INSURANCE COMPANY and their agents, servants, and/or employees knew, or in the exercise of reasonable care, should have known that the turbine system was a dangerous instrumentality if not properly designed, manufactured, tested, inspected, modified and/or customized and that the turbine system presented the probability of harm to any users and others unless it was free from defects. As a result. the aforementioned

Defendants had a duty to foreseeable users and to MARCUS DANIEL PERE´ in particular to:

1. Inspect the turbine system that it sold and placed in commerce to determine whether it would be reasonable [sic] fit for its intended uses before exposing the public to his unnecessary risk; and

2. Warn or give fair and adequate notice to the inherently dangerous condition existing as a result of the negligent design, manufacture and modification/customization of the turbine system and all mechanism pertaining thereto.

NUOVO PIGNONE, INC., PIGNONE, INC., COPPUS ENGINEERING, INC., TUTHILL CORPORATION, AGIP PETROLEUM COMPANY, ABC INSURANCE COMPANY, DEF INSURANCE COMPANY, GHI INSURANCE COMPANY, JKL INSURANCE COMPANY, and MNO INSURANCE COMPANY and their agents, servants, and/or employees breached this duty in that they negligently and carelessly failed to warn MARCUS DANIEL PERE´ of the inherently dangerous condition of the turbine system, and failed to inspect or test the same to determine whether it was reasonably fit for the intended use.

DAMAGES

15.

Upon the trial of this case, it will be shown that MARCUS DANIEL PERE´ died as a result of Defendants' negligence. The Petitioners respectfully requests [sic] that Court and Jury to determine the amount of losses that

NANCY G. PERE', individually and on behalf of her minor children, MATTHEW REED PERE' and MARCI DANIELLE PERE' suffered as a result of the death of MARCUS DANIEL PERE'. There are certain elements of damages provided by law that the Petitioners are entitled to have the Jury in this case separately consider to determine the sum of money for each element that will fairly and reasonably compensate the Petitioners for the injuries, damages and losses incurred in the past and to be incurred in the future, since the date of the accident. The elements of damages to be considered separately and individually for the purpose of determining the sum of money that will fairly and reasonably compensate the Petitioners for each element are as follows:

1. The loss of counsel, training, support and advice;
2. mental anguish;
3. loss of society;
4. loss of consortium; and
5. other damages to be proven at trial.

Additionally, Petitioners are entitled to recover exemplary damages for the gross negligence of the Defendants. Petitioners are also entitled to recover reasonable and necessary attorney's fees and court costs pursuant to the Texas Deceptive Trade Practices-Consumer Protection Act.

Because of all of the above and foregoing, Petitioners have been [sic] damages and will be damages in the amount in excess of the minimum jurisdictional limits of this Court, for which Petitioners now brings [sic] suit.

16.

Petitioners demand a trial by Jury on all issues.

WHEREFORE, Petitioners pray that the Defendants be duly cited to appear and answer this complaint, and that Defendants, NUOVO PIGNONE, INC., PIGNONE, INC., COPPUS ENGINEERING, TUTHILL CORPORATION, AGIP PETROLEUM COMPANY, INC., ABC INSURANCE COMPANY, DEF INSURANCE COMPANY, GHI INSURANCE COMPANY, JKL INSURANCE COMPANY, MNO INSURANCE COMPANY, be served in accordance with the Texas Long Arm Statute with a copy of the same in accordance with law and that after all legal delays and proceedings are had, that there be judgment rendered herein and in favor of the Petitioners, ordering NUOVO PIGNONE, INC., PIGNONE, INC., COPPUS ENGINEERING, TUTHILL CORPORATION, AGIP PETROLEUM COMPANY, INC., ABC INSURANCE COMPANY, DEF INSURANCE COMPANY, GHI INSURANCE COMPANY, JKL INSURANCE COMPANY, MNO INSURANCE COMPANY, to pay unto Petitioners actual damages which are reasonable and equitable in the premises, including exemplary damages, for the gross negligence of the Defendants, together with all costs and disbursements in this action with post-judgment and prejudgment interest until paid to the fullest extent allowed by law. Petitioners are entitled to recover exemplary damages for the gross negligence of the Defendants. Petitioners are also entitled to recover reasonable and necessary attorney's fees and court costs pursuant to the Texas Deceptive Trade Practices-Consumer Protection Act

as well as such other relief to which the law and equity entitles the Petitioners.

Respectfully submitted,

SONNIER & TRAHAN

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ATTORNEY FOR THE PETITIONERS

APPENDIX E

AGREEMENT NO. 133

WHEREAS, Operator is engaged in oil and gas exploration and development drilling operations and is in need of certain material, equipment, and services in connection therewith; and

WHEREAS, Contractor represents that it is qualified to furnish the aforementioned material, equipment, and services, and is desirous of providing the same on the terms and conditions set forth below;

NOW, THEREFORE, for and in consideration of the mutual promises and covenants herein contained, operator and Contractor do hereby agree as follows:

* * *

.05 Comply with all applicable U.S. or foreign laws, rules, regulations, or decrees, including the U.S. Foreign Corrupt Practices Act, and any amendments to any of the same which are now or may in the future become applicable to Contractor in connection with this Agreement or the performance hereof.

* * *

.11 Warrant and guarantee that all items of equipment and all component parts thereof, and all materials furnished to Operator as part of Contractor's performance of this Agreement shall be free of defects in materials and workmanship; shall conform in all respects to the descriptions, specifications, and drawings, if any, contained in this Agreement, or in any Schedule or Attachment made a part hereof, or in any other document, if any, specifically incorporated herein by reference, and shall function and perform as specified. This warranty is in addition to,

and not in lieu of, the implied warranties of merchantability and fitness for a particular purpose of the Uniform Commercial Code of the State of Texas or of any State of the U.S. having jurisdiction hereof. For purposes of the warranties and other statutory matters provided for in the said Uniform Commercial Code the Parties contemplate, agree and understand that that portion of Contractor's performance hereunder involving the furnishing of equipment and/or materials shall be deemed a sale of goods. The warranty remedies mentioned in this subsection are in addition to, and not in substitution of, any other remedies to which operator might be entitled by virtue of any other provision(s) of this Agreement, or under applicable law.

* * *

.04 To indemnify operator, and its directors, officers, and employees, and hold the same harmless from all loss or damage resulting from charges, claims, demands, liens, suits, causes of action, arbitration, or other form of litigation and the cost of the same, including legal fees and the cost of settlement, alleging injury to, or death of, or damage to any property, or derogation of the legal interest of any person, including Contractor's employees, when such claim for loss or damage is asserted against Operator or operator's directors, officers, employees, agents, or contractors, in connection with the performance by Contractor of, or failure properly to perform, this Agreement during the execution of the service work in Angola. This indemnity shall be in effect with respect to loss or damage arising from, or alleged to arise from Contractor's actions. This indemnity shall be effective regardless of the legal theory on which such loss or damage is predicated, or the particular form of remedy sought or claimed. If this Agreement

is governed by Texas law, this indemnity provision adopts, and incorporates by reference, the exceptions to the limiting provisions of Texas Civil Statute, Article 2212(b) contained in said Article 2212(b)(4).

* * *

18. ARBITRATION. Any dispute, controversy, or difference between the Parties arising out of, or relating to, this Agreement which cannot be settled by mutual agreement shall be finally determined by arbitration in Zurich, Switzerland under the rules of the International Chamber of Commerce by a three-member arbitration panel appointed in accordance with the rules of the said International Chamber of Commerce. The arbitration award shall be final and binding on the Parties. Judgment upon the award may be entered pursuant to any treaty or convention, or international, or competent national or local basis of jurisdiction in any court or tribunal, for judicial acceptance or an order of enforcement, as the case may be.

19. GOVERNING LAW. Questions concerning the performance or execution of this Agreement shall be governed by the laws of The State of Texas, U.S.A.

* * *

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

NANCY G. PERÉ, et al	*	CIVIL ACTION
VERSUS	*	NO. CV94-1889
NUOVO PIGNONE, ET AL	*	JUDGE REBECCA DOHERTY
	*	MAGISTRATE JUDGE METHVIN

****

DEPOSITION OF SENIO PECCHI

(10-16-96)

* * *

[p. 23] Q Nuovo Pignone SpA?

A Yes.

Q And after 1994, in what capacity did you serve Nuovo Pignone SpA?

A Well, because I was involved in the privatization of Pignone, I continued to develop the similar activity, but for a more limited area that was in MEACE. That means Middle East, Africa, Central Europe.

Q Okay. All right. And that is what you've been doing since 1994?

A This was since the begin of 1994.

Q And do you serve in that capacity today?

A Today, no. Up until the end of June, because now I am retired.

Q Oh, okay. All right.

A The end of June.

Q A smart man.

All right. Let's go back to your marketing from 1985, on – Well, strike that.

Let's go back from 1979 until 1985. Did Nuovo Pignone SpA advertise its products, to the best of your knowledge, in any trade journals within the United States?

A Our advertising was made only in technical magazines [p. 24] that were distributed all over the world.

Q And were those periodicals or journals distributed in the United States?

A Yes, of course.

MR. CANTER:

Were those described distributed in the United States or distributed to the United States from Italy?

THE WITNESS:

Well, no. These are well-known technical magazines that are distributed all over the world and sometimes are published in the United States or published elsewhere.

BY MR. TRAHAN:

Q So your advertisements ran in these technical journals?

A Yes.

Q Nuovo Pignone SpA would purchase an advertisement in that journal?

A Yes of course.

Q And some of those journals were generated in the United States?

A Yes.

Q And this was from 1979 through 1985?

A This is also the common practice.

[p. 25] Q All right. And that was my next question. You jumped ahead of me, Doctor.

Has the customary practice, as far as Nuovo Pignone SpA's advertising practices, changed any since you became familiar with them in 1979?

A I would like to understand better, your question.

Q All right. And it was a very long question.

Has the practice – Nuovo Pignone SpA's practice of advertising in these technical journals, changed at all since 1979?

A No. It's the same as we've performed in the past.

Q Were there any other forms of advertisement besides the technical journals, that Nuovo Pignone utilized to showcase their products?

A Our advertising is mainly done in technical magazines.

Q Do you recall any of the names of these technical magazines?

A Yes, of course. "Hydrocarbon Processing."

Q "Hydrocarbon Processing"?

MR. CANTER:

It's on my coffee table.

MR. TRAHAN:

I'm going to get my subscription tomorrow.

BY MR. TRAHAN:

[p. 26] Q Any others?

A A "Oil and Gas Journal," "Chemical Engineering."

MR. DAIGLE:

Oh, I have that one in the men's room.

THE WITNESS:

"Oil and Gas Process," "Gas Turbine Journal," and some Italian technical magazines.

BY MR. TRAHAN:

Q Now, the ones you named earlier, "Hydrocarbon Processing," "Oil and Gas Journal," "Oil and Gas Process," and "Gas Turbine Journal," are those all United States technical journals?

A Not necessarily United States. I mean, they have a very large diffusion all over the world.

Q But are they published by an American publisher?

A According to my knowledge, not necessarily. The editor is in the U.S. But sometimes they are translated in another language and published outside of the United States.

Q Okay. But does the original publication – is it generated in the United States?

A Yes, I think so.

Q Okay. All right. Some forms may be translated into other languages and distributed around the world, but the origin of it is the United States?

* * *

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

NANCY G. PERÉ, et al	*	CIVIL ACTION
VERSUS	*	NO. CV94-1889
NUOVO PIGNONE, ET AL	*	JUDGE REBECCA DOHERTY
	*	MAGISTRATE JUDGE METHVIN

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DEPOSITION OF CARLO BRESCI

(10-16-96)

* * *

[p. 40] A It began on March 1st, for 12 months duration.

Q Okay.

A No, 18 months duration.

Q Okay. From March 1st of '93 –

A Up until September, '94.

Q Okay. Doctor, let's go back and let's leave these agreements alone for a minute, and let's talk about your service to the company as a sales representative.

Did you or any of your employees in the sales division solicit business in the United States?

A I did not understand. Sorry.

Q Okay. While you were representing Nuovo Pignone in the sales department or sales division for component parts –

A Parts and services.

Q did you or anyone under your supervision solicit business in the United States?

A Yes. We have one person that actually visits the American users in the States.

Q Who is that individual?

A The individual is Mr. Lighetti.

Q Spell that for me, please.

A L-I-G-H-E-T-T-I.

Q And he's employed by Nuovo Pignone, SpA?

[p. 41] A Yes, he is.

Q And he was employed in that capacity when you served in the sales of component parts or in the sale –

A No. He doesn't sell. He acts as a facilitator of this, visiting users, looking at their needs and keeping in touch with headquarters and soliciting quotations providing the right personnel. He asks for the right personnel for a venture.

Q Does he live in the United States?

A He lives in Houston.

Q And, if I understand you correctly, Doctor, his function was to visit various potential users of your equipment?

A Not potential – Users. Because to send parts, they are users.

Q Was anyone else besides this gentleman that you named – Did anyone else besides this gentleman that you named serve in that capacity while you were with the sales division?

A I don't understand. Sorry.

Q You named a gentleman just now –

A Yes.

Q – who visited various users of your equipment.

A Uh-huh (affirmative response).

Q Correct? Was there anyone else besides that

* * *

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

NANCY G. PERÉ, et al	*	CIVIL ACTION
	*	NO. CV94-1889
VERSUS	*	
	*	JUDGE REBECCA
NUOVO PIGNONE,	*	DOHERTY
ET AL	*	MAGISTRATE JUDGE
	*	METHVIN
	*	

****

DEPOSITION OF RAFFAELLO GUSSO

(11-6-96)

* * *

[p. 14] A Yes.

MR. CANTER:

Just for the Record, it's marked "Exhibit 24."

BY MR. TRAHAN:

Q Did you participate in the negotiation of Agreement No. 133?

A Only from a technical point of view, yes.

Q And when you say, "from a technical point of view," describe your involvement in the negotiation.

A Yeah. Since the beginning of the negotiation, I was especially involved in the selection of the gas turbine and the centrifugal compressor from a technical point of view to comply with the requirements for the customer.

Q Did you – The technical aspect that you have testified that you negotiated, who was the other party negotiating with you?

A Mr. Donovan of Gulf Oil.

Q And how did those negotiations take place?

A There were several meetings. One – The first one, in Florence, in August of '83. The second one, in Houston, in October of '83. And all the others, in Florence. The most important one was in March, '84, during which we put – defined the supply carefully, [p. 15] both from a technical point of view and a commercial point of view.

Q Altogether, Mr. Gusso – Now, did you participate in all of these negotiations?

A Yes.

Q Okay. Were there other negotiations between – To the best of your knowledge, were there other negotiations between Nuovo Pignone SpA and Gulf Oil that may have transpired either in Florence or Houston that you did not participate in?

MR. CANTER:

Objection, but you can answer it.

THE WITNESS:

As for as I know, no.

BY MR. TRAHAN:

Q So it's your belief that you participated in all of the negotiations between or all of the negotiation meetings between Gulf Oil and Nuovo Pignone SpA?

A Yes. At least the most important ones.

Q All right. What, generally, was the – as you understand it and are sitting here today, what was your understanding of the obligations of Nuovo Pignone SpA as to Agreement No. 133?

A The obligations were to supply three sets of gas turbines, plus one spare and to replace a previous [p. 16] type of the same gas turbine.

The first one was called MS1002-B, "B" for "Boston." And the upgraded type was 1002-"D" for "Denver." This had the possibility of operating the unit from 5200 horsepower to 6400 horsepower and allowed the customer to have a higher flow through the compressors – the driving compressors. Also, the driving compressors had to be replaced, as far as the internal bundles were concerned; not the casings.

Q My understanding also, after reviewing the contract, is this was designated as a reconfiguration agreement.

A Yes. It was an upgrade, actually, of the three units of the FOX platform.

Q So the entire – in a layman's sense, Mr. Gusso, the FOX platform underwent a major overhaul?

A Yes.

Q Now, under the terms of this agreement, what is your understanding of what Cabinda Gulf Oil's responsibilities were?

A Gulf, as far as I can remember, made the company with the Government of Angola, if I could remember, Sonangol. And the company name was CABGOC. And that was our – how can you say – operator and the [p. 17] second part of the agreement, the counterpart of the signed agreement. And they had the responsibility for all of the units installed in the platforms and also the operation and maintenance of these units.

Q Okay. But under the terms of Agreement No. 133, as I read it, my understanding is you would provide all of the parts, services and replacements for these turbines, and their obligation was to pay you to do that?

A Right.

Q So that is an accurate summary of the agreement, as far as the obligations of the parties?

A Sure.

Q Okay. All right. Now, under the terms, there are different provisions in this contract, Mr. Gusso, that I'm sure you're familiar with. And one of which is a possible cancellation provision. Do you know whether or not at anytime, whether this reconfiguration agreement, Agreement No. 133, was canceled?

A I don't know. But I don't think so.

Q Okay. Do you recall the consideration of the price that Cabinda Gulf Oil was to pay to Nuovo Pignone for Nuovo Pignone SpA's satisfaction of their obligation under this contract?

[p. 18] A Yes.

Q How much was it?

A 3.2 million dollars.

Q And that's in U.S. dollars?

A Yes.

Q Okay. And after reviewing the contract, it appeared that the 3.2 million dollar consideration or price was solely for the parts and materials. Is that description inaccurate, and was there an additional charge for the services rendered by Nuovo Pignone SpA employees?

A Yes, there would be an additional contract or agreement for the services of our people over there.

Q There's a separate agreement aside from this No. 133 for personnel?

A I never saw it.

Q Okay. So you don't know if it exists?

A Yes.

Q Okay. But am I correct in summarizing the agreement in that, the obligations of Nuovo Pignone SpA under this agreement, Agreement No. 133, would have furnished materials, equipment and personnel to reconfigure the G-FOX platform?

MR. CANTER:

Objection as to form. The agreement speaks

* * *

[p. 40] case?

A Yes.

Q All right. Let's turn to "Schedule G," Dr. Gusso. And I'm going to ask you if you can identify what "Schedule G" is.

A Yes.

Q What is it?

A Well, it probably is an effort to better identify the type of supply that are revisions of the agreement – of the content of the agreement.

Q So it is a more – would it be fair for me to describe this schedule as a more accurate and specific representation of the work to be performed and materials to be provided by Nuovo Pignone SpA?

A From some aspects, yes.

Q Okay. All right. Now, I have highlighted, at the top of that document, Doctor, I think that FC-1C. Does that designation mean anything to you, or can you tell me what it represents?

A If I can remember, FC-1A, 1B and 1C are the three trains – turbocompressor trains that had to be upgraded.

Q Upgraded, okay. So these are the three compressor trains that underwent reconfiguration?

A Right.

* * *

[p. 75] Thank you. That's all of the questions that I have.

MR. TRAHAN:

I have a few follow-ups, in light of the last set.

Doctor, would you retain that document, please?

BY MR. TRAHAN:

Q For the reconfiguration to be effective, would it be a fair assessment for me to say that you had to take into account the accessories or other components of the FC-1C train?

A They remained exactly as they were. The only modification occurred in the inlet duct and the expansion joint.

Q But the specifications of those accessories would be valuable information in determining the ramifications or the specifics of the reconfiguration of the turbines?

A They were only checked from an engineering point of view, if they were sufficient and in agreement with the new parts that were put in the gas turbine and in the compressors. And they were found right, because they add sufficient margin to satisfy the requirements of both machines.

[p. 76] Q So certainly, before the reconfiguration process began, Nuovo Pignone SpA had to determine whether the other components of the skid were compatible with the items to be installed?

A Yes, of course. As usual, we do.

Q So, in effect, the entire skid and its accessories had to be reviewed to determine whether the accessories were compatible with the proposed reconfiguration?

A Yes.

Q So the physical modifications may have only been to the portions highlighted by Mr. Daigle?

A Yes.

Q But the entire skid was evaluated?

A Was checked.

MR. TRAHAN:

I think that's all I have.

Jim, do you have any?

MR. DILL:

No, I don't.

MR. DAIGLE:

Sam?

MR. MASUR:

No questions.

(Whereupon, the Deposition was concluded at 11:45

* * *

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

NANCY G. PERÉ, et al	*	CIVIL ACTION
VERSUS	*	NO. CV94-1889
NUOVO PIGNONE, ET AL	*	JUDGE REBECCA DOHERTY
	*	MAGISTRATE JUDGE METHVIN

****

DEPOSITION OF MARCO CIONCOLINI

(6-6-96)

* * *

[p. 30] A Yes.

Q Okay.

MR. CANTER:

What page are you on?

MR. TRAHAN:

The Doctor indicates that the price is located on page 31.

MR. CANTER:

What exhibit is it?

THE WITNESS:

Thirty-one.

MR. TRAHAN:

Nineteen.

CONTINUATION OF EXAMINATION BY MR. TRAHAN:

Q What was the price, Doctor?

A The price is $21,140,482.

Q And that was the total price for the entire project which Nuovo Pignone was contracted to perform on?

A It was the price of this contract.

Q The price of just this contract?

A Yes.

Q Correct. Now, Doctor, on page 3 of the contract, under equipment specifications 1.1, subsection B, and I have a star by it, Doctor.

MR. CANTER:

* * *

[p. 40] A This document is a commercial invoice.

Q Okay. And who's it to?

A It's to Sonangol and CABCOC, care of Cabinda Gulf Oil Company in Luanda.

Q Okay. And what other information is reflected on that invoice, Doctor?

A There is the designation of the goods shipped.

Q Okay. Does it indicate where the goods were shipped?

A No, I don't see the shipment date here.

Q Doctor, do you know where these turbine compressor systems were shipped to?

A I am not able to identify that from this document.

Q But outside of this document, do you have personal knowledge as to whether these compressors – for lack of a better term, turbine and compressor systems shipped to?

MR. DAIGLE:

Excuse me. Let's go off the record a minute.

(Whereupon, a brief off-the-record discussion was had by Counsel.)

THE WITNESS:

You're asking the date?

MR. TRAHAN:

[P. 41] No. No. Just where.

CONTINUATION OF EXAMINATION BY MR. TRAHAN:

Q Doctor, do you know where the document, I mean, the compressor and turbine system shipped to?

A Shipped to Louisiana.

Q And what was the purpose for them being shipped to Louisiana?

A In Louisiana there was the building of the deck of the platform.

Q Doctor – Okay. I'm sorry. Continue.

A The turbine has to be put on the deck for final shipment to Luanda.

Q I reviewed several of the purchase – the shipping documents that were produced by Chevron. It appears, Doctor, from those documents – And I want you to correct me if I'm wrong – that Nuovo Pignone packed those turbines and compressors?

A Yes. Nuovo Pignone packed them.

Q Nuovo Pignone?

A Nuovo Pignone.

Q Were those items – And when I say "items," I'm talking about compressors and turbines. It appeared from the documents that compressors were packed in a crate and the turbines were packed in a separate crate; is that accurate?

* * *

[p. 82] CONTINUATION OF EXAMINATION BY MR. DILL:

Q This particular one, yes. I'm very specific here.

A I told before that in this case, several components had been shipped individually – gas turbine, compressors, ducting, electric panels for each individual gas turbine compressor tank.

Q Were you involved with the Cabinda Gulf Oil project when those components were shipped to the United States?

A Yes. I was in the position –

MR. CANTER:

Next question.

CONTINUATION OF EXAMINATION BY MR. DILL:

Q What was your position?

A I was Manager of gas turbine and compressor sales.

Q Did you send or did Nuovo Pignone S.p.A. send a representative of Nuovo Pignone S.p.A. to Louisiana to supervise or consult in the assembly of the component parts onto the platform?

A I think, yes.

Q Do you know how long that representative or those representatives stayed in Louisiana?

A I don't know the time.

Q Do you know how many were sent?

A No, I don't remember.

[p. 83] Q Was it more than for just a day or two days?

A Yes, certainly. Yes.

Q Do you know the name of the person or persons that were sent?

A No.

Q Do you know the capacity that that person had when they were here, whether it was a representative to consult or did they actually do the assembly?

A They consult, but they do not make a physical assembly. And the consultant is for mechanical erection.

Q Okay. I'm going to change gears a little bit. Since I'm doing clean-up here, we're going to bounce around a little bit and I apologize. Are you still an employee of Nuovo Pignone S.p.A?

A Yes.

Q You are considered to still be a payroll employee?

A I am in the payroll of Nuovo Pignone S.p.A.

Q But you are assigned to Turbotecnica?

A I am assigned to Turbotecnica S.p.A.

Q Do you know if those persons working for Pignone S.p.A. – I'm sorry – PIGNONE, INCORPORATED in the United States are also considered to be employees of Nuovo Pignone S.p.A.?

[p. 84] MR. CANTER:

Considered by whom?

MR. DILL:

By Nuovo Pignone S.p.A.

THE WITNESS:

I cannot give you a legal answer.

CONTINUATION OF EXAMINATION BY MR. DILL:

Q Do you receive a paycheck from Nuovo Pignone S.p.A. on a regular basis today?

A Yes.

Q Do you know if the persons at PIGNONE, INCORPORATED in the United States receive a paycheck from Nuovo Pignone S.p.A.?

A I don't know.

Q Are you familiar with any of the other wholly-owned subsidiaries of Nuovo Pignone S.p.A. and how their personnel are associated to the parent company?

A In any country or in the United States?

Q In any country.

A Yes, I am familiar with this.

Q Which of the subsidiaries are you familiar with?

A For instance, with Pignone, Espanol.

Q Do you know if the persons that work for that company receive their paycheck from Nuovo Pignone S.p.A.?

* * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

NANCY G. PERÉ, et al	*	CIVIL ACTION
VERSUS	*	NO. CV94-1889
NUOVO PIGNONE, ET AL	*	JUDGE REBECCA DOHERTY
	*	MAGISTRATE JUDGE METHVIN

****

DEPOSITION OF MARIO SONCINI

(5-30-96)

* * *

[p. 35] motors.

Q Okay. What does it manufacture according to –

A What is in this page are centrifugal and axial compressors. This is one of the products designed and manufactured by Nuovo Pignone SpA.

Q Doctor, turn to page 47, if you don't mind. I think I've got it marked. Yeah, under the title, "Subsidiary Companies and Sales Offices" – Again, we're in "Exhibit #9," page 47. It indicates that PIGNONE has American organizations, PIGNONE, INC. and Pignone Textile Machinery, Inc. in Spartanburg. Is that in South Carolina?

A That's correct.

Q Okay. What, in the brochure you're holding, what is the purpose or the designated function of the Houston office of PIGNONE, INC., according to that document?

A Houston or –

A Houston.

A As I said before, PIGNONE, INC. headquarters are in [p. 36] New York. The other two offices are in Los Angeles and Houston.

Q Okay.

A And these offices promote and market all Pignone products – Nuovo Pignone products, with the exclusion of the textile machinery, which is another product of Nuovo Pignone in Italy. And this activity of promoting and selling textile machinery in the States is done through PTMI, Pignone Textile Machinery, Incorporated in Spartanburg South –

Q Carolina, right.

A Correct.

And that's all.

Q Okay. Doctor, in this document, it also states that the Houston office runs a spares depot which serves all machines installed in the American area.

What is a "spares depot"?

A This is a – is not a depot. It's more an area where we have very, very few parts for small machines

* * *

APPENDIX G – STATUTES – text of relevant provisions of the FSIA

This litigation involves the interpretation and application of provisions of the Foreign Sovereign Immunities Act:

28 USCS § 1602. Finding and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 USCS § 1603. Definitions

For purposes of this chapter [28 USCS §§ 1602 et seq] –

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity –

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 USCS § 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case –

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

* * * *